(17,875.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 136.

WILLIAM B. DINSMORE AND C. GRAY DINSMORE, AND WILLIAM B. DINSMORE, C. GRAY DINSMORE, AND DUMONT CLARKE, AS EXECUTORS AND TRUSTEES UNDER THE WILL OF WILLIAM B. DINSMORE, DECEASED, PETITIONERS,

vs.

THE SOUTHERN EXPRESS COMPANY; L. N. TRAMMELL, THOMAS C. CRENSHAW, JR., AND SPENCER R. ATKINSON, COMPOSING THE RAILROAD COMMISSION OF THE STATE OF GEORGIA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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a

Caption.

UNITED STATES OF AMERICA,
Fifth Judicial Circuit.

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth judicial circuit, begun on the third Monday of November, 1899, and held in the court-room of said court in the city of New Orleans.

Before the Honorable Don A. Pardee, United States circuit judge for the fifth judicial circuit; the Honorable David D. Shelby, United States circuit judge for the fifth judicial circuit, and the Honorable T. S. Maxey, United States district judge for the western district of Texas.

L. N. TRAMMELL ET AL., Railroad Commissioners of the State of Georgia, Appellants,
vs.
WILLIAM B. DINSMORE ET AL, Appellees.

WILLIAM B. DINSMORE ET AL., Cross-appellants,
vs.
THE SOUTHERN EXPRESS COMPANY, L. N. TRAMMELL, ET AL., Railroad Commissioners of the State of Georgia, Cross-appellees.

Be it remembered that heretofore, to wit, on the 17th day of April, 1899, a transcript of the record from the circuit court of the United States for the southern district of Georgia was filed in the office of the clerk of the United States circuit court of appeals for the fifth circuit in the words and figures following, to wit:

1

Bill of Complaint.

WILLIAM B. DINSMORE ET AL.
vs.
THE SOUTHERN EXPRESS COMPANY. } In Equity. No. 29.

UNITED STATES OF AMERICA,
Southern District of Georgia, Northeastern Division.

To the fifth circuit court of the United States for the northeastern division of the southern district of Georgia:

William B. Dinsmore, of the city of New York and a citizen of the State of New York; C. Gray Dinsmore, of the city of New York and a citizen of the State of New York, in proper person, and the said William B. Dinsmore and C. Gray Dinsmore and Dumont Clarke, all of the city of New York and citizens of the State of New York, as executors of and trustees under the will of William B. Dinsmore, deceased, late of the State of New York, and who produce here to the court their letters testamentary, ready to be shown,

bring this their bill of complaint in behalf of themselves and all other shareholders who are similarly situated and who shall be entitled to avail themselves of the benefits of this suit against "The Southern Express Company," a corporation created by and existing under and by virtue of the laws of the State of Georgia, located and having its principal office for the transaction of business in the city of Augusta, in the northeastern division of the southern district of Georgia; against Leander N. Trammell, of Marietta, and a citizen of the State of Georgia; Thomas C. Crenshaw, of Cartersville, and a citizen of the State of Georgia; and Spencer R. Atkinson, of Atlanta, and a citizen of the State of Georgia, composing the railroad commission of the State of Georgia, and against Joseph M. Terrell, of Greenville, and a citizen of the State of Georgia, as attorney general of the said State, the official residences of the said Trammell, Crenshaw, Atkinson, and Terrell being at Atlanta, in the northern division of the northern district of Georgia:

And thereupon your orators complain and say as follows:

First. Your orators show that the defendant, "The Southern Express Company," is a corporation originally incorporated July 5, 1861, for the space of fourteen years, to carry on the business of express forwarding, whose corporate existence was continued May 14, 1875, for a like term of fourteen years, and which company was, by act of the General Assembly of Georgia, approved December 21, 1886, P. L., 207, reincorporated, and all the rights, privileges,
2 and franchises, then possessed and enjoyed by the corporation continued of force, and the then corporators, with their associates, then existing as a body politic and corporate, declared to be incorporated under the said name of "The Southern Express Company" for the term of thirty years. This act enacts, in section 8, that the corporation is created for the purpose and object of enabling the aforesaid incorporators, their associates and successors, by the aforesaid corporate name, to engage in and carry on, in the State of Georgia, and in any and all of the States and Territories of the United States and in foreign countries where permitted, the business of carrying, transporting and forwarding, by railroad, steamboats, ships, canals, stages, and other means of transportation, goods, wares, merchandise, money, bills, notes, bullion, packages, parcels, and movable valuables of any description for delivery, collection, exchange, or otherwise over and upon such lines and routes as they may from time to time establish, and between geographical points, places or stations at which they may from time to time establish and continue agencies; and the said corporation was thereby invested with the powers necessary and proper for the said purpose, as well as the powers incident and appropriate to express carriers, and especially with full power to give such security, in the nature of a general transportation bond, as may be required by the laws of the United States and the regulations passed in relation thereto for the transportation and delivery of dutiable merchandise and other property in bonds from port to port in the United States. Reference is hereby prayed to said acts as if a duly authenticated copy thereof was annexed as an exhibit hereto.

Second. That by the fourth section of said legislative act it was enacted that the corporation thereby created shall issue to its members certificates or shares representing the interest owned by such member in the corporation in such form as it may be deemed expedient; that the business of the said express company is that of a common carrier for hire, and as such it has no income nor property nor money that is not necessary and in use in its business; that its income arises from the hire it receives or charges it makes in doing the transportation of express business by carrying quickly money, goods, wares, merchandise, and personal property, such carriage being made by the express company and its agents from points, first, within the State of Georgia, as from Atlanta to Augusta, or from Savannah to Atlanta; second, from points in the State of Georgia to points without the State, as from Augusta, Georgia, to Columbia, South Carolina, or Richmond, Virginia, or Nashville, Tennessee, and so on; and, third, from point to point wholly without the State of Georgia, as from Washington, District of Columbia, to Rich-
3 mond, Virginia, or New Orleans, Louisiana, or Memphis, Tennessee, and so on, and for which it issues through bills of lading in each case; that in order to carry quickly goods entrusted to it the said Southern Express Company uses the trains of the various railroads in the Southern States; that in this way it comes in contact with other express companies and transportation agencies, with whom it has connections and contracts, and exchanges business; that in all such cases only such rates of freight or charges for carriage are made as are reasonable and just for the service rendered and as permitted by law; that in order to do its part of this public service and to facilitate the quick despatch of any such business and commerce intrusted to it in its territory, to wit, in the States of Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, Tennessee, Kentucky and elsewhere, the said The Southern Express Company owns and its capital is invested in a large amount of personal property, such as delivery wagons, horses, houses, safes, office furniture, etc., which is of large value, and also money, undivided income, arising from its business, which is due to and held by it and its connecting express companies to answer for all wages, salaries of many employés, all losses, mistakes, and obligations incurred in carrying on the business aforesaid and payments to railroad companies for transportation over them.

Third. That in and by the said legislative act of December 21, 1886, it is, among other things, enacted that the rights, privileges, and powers then possessed and enjoyed and continued of force are to be exercised by the board of directors, who are to make rules, regulations, by-laws, and ordinances for the control, direction, management, and operation of their affairs and business not inconsistent with the laws of the State of Georgia and of the United States; that your orators are informed and verily believe that Henry B. Plant, Michael J. O'Brien, Morton F. Plant, and Henry Sanford are the directors of the said defendant express company, duly elected as such, and are now acting in that capacity and managing and conducting

all and singular the stock, property, affairs, and concerns of the said defendant express company.

Fourth. That your orators are citizens of the State of New York and residents of the city of New York; that upon the reincorporation of the said The Southern Express Company under the said legislative act they became the owners and holders of the shares now standing in their names on the books of the company, namely, William B. Dinsmore, 100 shares; C. Gray Dinsmore, 100 shares; estate of William B. Dinsmore, 800 shares; the approximate actual value of which shares is fifty thousand dollars ($50,000) or
4 other large sum; that the aggregate shares of the said express company outstanding amount to fifty thousand and are divided among a large number of different persons, who as such shareholders constitute a large body, and this suit is for an object common to them all. Your orators therefore bring it in their name in their behalf as holders of shares of interest in the said express company and as representatives and on behalf of such other shareholders similarly situated and interested as may choose to intervene and become parties hereto.

Fifth. Your orators further show that on the 13th day of June, 1898, there was approved an act of Congress of the United States entitled "An act to provide ways and means to meet war expenditures, and for other purposes," section 6 of which act requires that on and after the "first day of July, eighteen hundred and ninety-eight, there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock, and of indebtedness and other documents, instruments, matters, and things mentioned and described in Schedule A of this act, or for or in respect of the vellum, parchment, or other paper upon which such instruments, matters, or things, or any of them, shall be written or printed by any person or persons or party who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule." And in Schedule A, attached to the twenty-fifth section of the said act, appears the language, as follows: "Express and freight. It shall be the duty of every railroad or steamboat company, carrier, express company, or corporation, or person, whose occupation is to act as such, to issue to the shipper or consignor, or his agent, or the person from whom any goods are accepted for transportation, a bill of lading, manifest, or other evidence of receipt and forwarding for each shipment received for carriage and transportation, whether in bulk or in boxes, bales, packages, bundles, or not so enclosed or included; and there shall be duly attached and cancelled as in this act provided to each of such bills of lading, manifests, or other memorandum, and to each duplicate thereof, a stamp of the value of one cent. Any failure to issue such a bill of lading, manifest, or other memorandum as therein provided shall subject such railroad, or steamboat company, carrier, express company, or corporation or person, to a penalty of fifty dollars for each offense, and no such bill of lading, manifest or other memorandum

shall be used in evidence unless it shall be duly stamped as aforesaid."

Sixth. That after the approval of the said act of Congress, June 13, 1898, and when it became operative, the said Southern Express Company asked and demanded the production by its customers of the stamp required to be attached under the provisions of the said act at the issuing of its receipts or bills of lading, said express company insisting that it should not carry any package or issue its receipt therefor until the sender or shipper furnished the necessary governmental stamp therefor, as required by said act.

Seventh. That certain citizens of Georgia refused to furnish the stamps to be attached to the receipts or bills of lading or to pay for the same if furnished by the express company, and thereupon complained to the railroad commission of the State of Georgia, to wit, the said Trammell, Crenshaw, and Atkinson, who on July 11, 1898, issued an order as follows:

"It being represented to the railroad commission of Georgia that the Southern Express Company, a corporation engaged as an express company within this State in the business of a common carrier of goods and merchandise for hire, since the passage by the Federal Congress of an act, approved June 13, 1898, entitled 'An act to provide ways and means to meet war expenditures, and for other purposes,' has exacted and continues to exact from shippers as a condition precedent to forwarding any goods tendered to it for transportation between points within this State the payment of a special tax upon such shipments imposed by said act, thus indirectly increasing the cost of transportation beyond the rate fixed therefor by this commission, it is

"Ordered that the Southern Express Company do appear before this commission on the 18th day of July, 1898, then and there to show cause, if any it can, why it should not be held to have violated the rules and regulations of this commission by the exactions or overcharges, as aforesaid, and why suit should not be instituted against it in every case of such overcharges for the recovery of the penalty provided by law for such illegal act."

Cause was shown respectfully denying all jurisdiction in the premises on the part of the said commission, who, on August 2, 1898, ordered and directed the said stamp tax to be furnished, attached, cancelled, and paid by the said Southern Express Company alone, and not by the shippers, in whole or in part.

Eighth. That by paragraph 1, section 2, article IV of the Constitution of Georgia, of December 21, 1877, section 5797 of the Civil Code, it is ordained that the power and authority of regulating railroad freights and passenger tariffs, preventing unjust discriminations, and requiring reasonable and just rates of freight and passenger tariff were thereby conferred upon the General Assembly, whose duty it shall be to pass laws, from time to time, to regulate
6 freight and passenger tariffs, to prohibit unjust discriminations on the various railroads of the State, and prohibit said roads from charging other than just and reasonable rates,

and enforce the same by adequate penalties; that, acting under this constitutional provision, the General Assembly of the State of Georgia passed an act on October 14, 1879, to carry the same into effect, which was enlarged by the acts of December 18, 1890, October 16, 1891, August 31, 1891, and October 17, 1891, which said acts now comprise sections 2185 to 2217 of the Civil Code of the State of Georgia, to which express reference is hereby made as if set out herein; that by another act approved October 21, 1891, the General Assembly passed an act extending the powers of the railroad commissioners so as to give them power and authority to regulate charges for express companies for transportation, and to apply the powers given the said commissioners by law over railroad companies to all companies or persons owning, controlling, or operating a line or lines of express, and to make the penalties prescribed against railroads for violating the commissioners' rules apply to the companies or persons therein named whose line or lines is or are wholly or in part in the State, and for other purposes, the enacting part of which act is now section 2217 of the Civil Code of Georgia; that section 2 of the said act which is now 2218 of the Civil Code of Georgia, enacts that the powers of the commissioners to regulate charges for corporations, companies, and persons herein referred to shall apply only to charges by express for the transportation from one point to another in the State of Georgia.

Ninth. That, pursuant to the authority delegated to them, the railroad commissioners of Georgia fixed and prescribed rules, tariffs, and classifications governing express companies plying between points within the State of Georgia and submitted the same from time to time to the executive of the said State. To these, as they last appear in the twenty-fifth report, submitted October 15, 1897, and published and distributed throughout the State, complainants refer, praying to be excused from annexing a copy hereto on account of the voluminous character and details thereof.

Tenth. That the said Southern Express Company from the date of the passage of the said legislative act, October 21, 1891, have conformed to the rules, orders, and tariffs so adopted by the railroad commission of Georgia, and were continuing to do so when said act of Congress of June 13, 1898, became operative; that the penalty fixed by the said legislative acts of the State of Georgia for violating any order or rule or regulation of the railroad commission of the State of Georgia is not less than one thousand dollars ($1,000) nor more than five thousand dollars ($5,000) for each offense, to be fixed by the presiding judge in a suit where action is brought
7 against the company, which suits are to be brought by the attorney general of the State when directed by the said railroad commission.

Eleventh. That your orators are informed and believe that the payment of the tax imposed by the said war-revenue law of 1898, as required by the said order of the said railroad commission, will aggregate to the Southern Express Company in the State of Georgia annually the sum of forty-two thousand dollars ($42,000) or other large sum, and complainants aver that the said railroad commission

were without any authority under the constitution and legislative acts of the State of Georgia, or under the said act of Congress approved June 13, 1898, to require the payment of the said stamp tax upon and before issuing its receipts and bills of lading; complainants averring, also, that the express company has to make its own arrangements with the railroads for the carrying of its freight on passenger trains; that the railroads cannot be compelled to do this for the express company, and there is no prescribed limit to their charges against the Southern Express Company, as there is no charges made against the public; that the contracts of the express company with the railroad companies are matters of negotiation, and the average charge of the railroad is 50 per cent. of the express company's gross receipts; that it costs the express company 43 per cent. of its receipts to do its business, and this, added to the average 50 per cent. which must be paid to the railroads, makes the total cost to the express company 93 per cent. of its receipts. A considerable express business is done at a charge of 10 cents per package, and a very large proportion of its intrastate business is done at a charge of 25 cents per package. Take 93 per cent. from these charges and there is left a margin of seven-tenths of a cent on the 10-cent packages and one three-quarters of a cent on the 25-cent packages. If the express company is compelled to pay one cent each on the receipts, it loses three-tenths of a cent on every 10-cent package and makes only three-quarters of a cent on the 25-cent packages. This would materially reduce the very moderate profit of the business, and will so reduce the income of the company as to lessen any dividends payable to its shareholders, like complainants. That under section nine of the act of the General Assembly of the State of Georgia, approved December 24, 1896, Public Laws 28—to levy and collect a tax for the support of the State government for the years 1897 and 1898—all persons or companies doing an express business and charging the public therefor in the State of Georgia were required to "pay 2½ per centum on their gross receipts," and all persons or the superintendent or general agent of each express company were required to make a quarterly return under oath, in the form therein prescribed, under a
8 penalty of indictment, conviction, and punishment, pursuant to section 1039 of volume III of the Code of 1895, and a failure to pay the tax will subject such corporation to a forfeiture of its charter; that under the provisions of this act, in the imposition of this tax and the enforcement thereof, no deduction will be allowed for the expense the company is subjected to in complying with the said order of the railroad commission and in making payment itself of the stamp tax imposed by the said revenue act of Congress. In other words, the corporation will be paying a tax to the State upon the entire aggregate sum paid out for stamps, as required by the order of the railroad commission, which payment will come out of the gross income of the company.

And complainants aver that there is no reason to believe that there can be and will be an increase of complainants' local and intrastate business; that the cost of conducting said business has been

fixed by years of experience, and the amounts now paid therefor are the lowest that can be obtained and adopted and by which the public can be satisfactorily served by said express company; that the charges fixed by said commissioners before the passage of the said revenue law were established so as to enable the company to live, operate and pay a fair dividend or return to its owners for the money and property embarked in the said business, and that the order of the said commissioners requiring the payment by the said company of the said one-cent stamp on all bills of lading and receipts that it issued for the business done was resolved upon by the said commissioners illegally and arbitrarily and will cause a large reduction in the income of the company; that the enforcement of this order will be unfair, unjust, and unreasonable; that the rates of carriage now imposed require the said express company to carry many classes of freight at barely cost, and the expense incident to said service will in future be materially increased by the stamp aforesaid; that the payments for said stamps thus required to be made as a part of the rates imposed on the express company, and under which it must do business by the order of said commission, will result in irreparable damage and injury and will cause a diminution of income, as nearly as can be ascertained, of forty thousand dollars ($40,000) per annum and a loss to complainants in a decreased value of their shares of ten thousand dollars or other large sum.

Twelfth. That your orators are informed and verily believe that, in compliance with the requirements of the orders of the railroad commission of Georgia, as aforesaid, the said The Southern Express Company and its directors have avowed their intention and purpose to comply therewith and take no steps whatsoever to
9 resist the enforcement of the order of the said commissioners, for fear of the penalties which may be assessed against them in the event of their non compliance with the order of the commission.

Thirteenth. Your orators further show that this suit is not a collusive one to confer on a court of the United States jurisdiction of the case, of which it would not otherwise have cognizance, and that they duly requested the Southern Express Company and its directors, and each of them, in writing to omit and refuse to pay and to refrain from paying the said tax, and to contest the constitutionality of the said action, and to refrain from voluntarily placing stamps upon its said receipts and cancelling the same before delivery, and to apply to a court of competent jurisdiction to determine the liability of the company under the said act, in the mode and manner as required by the said railroad commission; that a copy of the said request is hereto annexed as Exhibit "A" and made a part of this bill of complaint; that said express company, after a meeting of the directors, at which the matter of the request was formally laid before them for action, they, as your orators are informed and verily believe, refused and still refuse and intend not to comply with your orators' demand, and, as your orators are informed and verily believe, they have resolved and determined and

intend to comply with all and singular the provisions of the order of the said railroad commission; that a copy of the reply sent to complainants by the said Southern Express Company is hereto annexed as Exhibit "B" to this complaint; that it is stated in the said reply that the company would file an application to be allowed to collect from the shipper, in addition to the existing rates sanctioned by the commission, the war-revenue tax, held by the commission to be payable by the company; that upon the receipt of this reply complainants delayed action but have now had transmitted to them by the said Southern Express Company a certified copy of the resolution of the board of directors, dated August 29, 1898, which sets forth the fact that the application filed by the company to be allowed to collect from the shipper the one cent upon each receipt or bill of lading has been refused, and that the company will now proceed to respect and obey the order of the commission requiring it to pay the war-revenue tax on interstate business without endeavoring to collect the same from shippers, a copy of which is hereto annexed, marked Exhibit "C;" to all of which exhibits express reference is prayed.

Fourteenth. Your orators further show that the said Southern Express Company and its directors, having declared their intention to do so, will now pay the said revenue tax out of the income and profits of the company, and will thereby diminish the assets of the company and lessen the dividends thereon and the value of its shares, and will also pay the tax to the State on its gross income without any deductions therefrom of the revenue tax so imposed; that the voluntary compliance with the provisions of the said order of the railroad commission will expose the express company to a multiplicity of suits by and on behalf of its numerous shareholders, which will work irreparable injury to the business of the company and involve it in great and irreparable damage to your orators and of all the other shareholders.

Fifteenth. Your orators further show that this is a suit of a civil nature in equity; that the matter of dispute exceeds, exclusive of interest and cost, the sum or value of five thousand dollars ($5,000), and arises under the Constitution and laws of the United States.

Wherefore, and in consideration whereof, and forasmuch as your orators are remediless in the premises at any by the strict rules of the common law, and are relievable only in a court of equity, where matters of this nature are cognizable and relievable—

Your orators pray:

1. That it may be adjudged and decreed that the order of the railroad commission of the State of Georgia of August 2, 1898, requiring the Southern Express Company to pay the amount of the war-revenue tax on business from one point to another in the State of Georgia without endeavoring to collect the same from shippers or requiring them to make the payment thereof before the issuing of the said receipts or bills of lading, to be without jurisdiction on the part of the said commission, unconstitutional, null and void.

2. That the Southern Express Company, its officers and agents,

be restrained from voluntarily complying with the provisions of the said order of the said railroad commission of August 2, 1898, and paying the said war-revenue tax as aforesaid.

3. That the attorney general of the State of Georgia be restrained from instituting any suit of any sort against the Southern Express Company for the purpose of enforcing the provisions of the said order of the said railroad commission of August 2, 1898.

4. That a writ of provisional and perpetual injunction, of the same purport, tenor and effect, as hereinbefore set forth, be granted to complainants.

5. That your orators may have such other and further relief in the premises as the nature of the case shall require and to a court of equity may seem meet.

To the end, therefore, that the said defendants may, if they can, show why your orators should not have the relief herein and hereby prayed, and may full, true, direct, and perfect answers make to the best and utmost of their knowledge, remembrance, information, and belief, the said Southern Express Company under its corporate seal, and the other defendants not under oath, an answer under oath being hereby expressly waived, to each and all of the matters and things in this bill of complaint contained, and that as fully and particularly as if the same were here repeated, paragraph by paragraph, and they were specially interrogated thereunto.

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And may it please your honors to grant unto your orators the writ of subpœna of the United States of America, directed to the said defendants, The Southern Express Company, Leander N. Trammell, Thomas C. Crenshaw, and Spencer R. Atkinson, individually and as railroad commissioners of the State of Georgia, and Joseph M. Terrell, individually and as the attorney general of the State of Georgia, commanding them and each of them, on a certain day and under a certain penalty to be therein inserted, to be and appear before your honors in this honorable court, and then and there full, true, direct, and perfect answer make to all and singular the premises; and further, to perform and abide by such further order and decree as to your honors shall seem meet.

And your orators, as in duty bound, will ever pray, etc.

FRANK H. MILLER,
Solicitor for Complainants.

EXHIBIT A.

No. 128 BROADWAY,
NEW YORK CITY, *August* 8, 1898.

To Henry B. Plant, president, and to the board of directors of the Southern Express Company, and also to the Southern Express Company in its capacity as a corporation created by and existing under the laws of the State of Georgia:

Please take notice that we are shareholders in the Southern Express Company to the amounts set opposite to our respective names hereto attached.

We are informed that the company intend to voluntarily comply with the requirements of the order of the railroad commission of the State of Georgia dated August 2, 1898, which order imposes upon the Southern Express Company the duty of furnishing at its own expense, the revenue stamps required to be attached to bills of lading or receipts before receiving and forwarding goods tendered for shipment, the said stamp tax being imposed by the act of Congress approved June 13, 1898, entitled An act to provide ways and
12 means to meet war expenditures and for other purposes, particularly specified in sections 6 and 26, Schedule A, thereof.

We claim that the action of the said railroad commission of the State of Georgia is illegal, invalid, beyond their jurisdiction, unconstitutional, null and void.

As such shareholders in the Southern Express Company, we hereby protest against any action of the Southern Express Company and its directors in voluntarily complying with the order of the said railroad commissioners of the State of Georgia and their construction of the provisions of the said act of Congress as binding upon the Southern Express Company, and we hereby request that the Southern Express Company and its directors shall refrain from voluntarily accepting the said order or complying therewith and voluntarily paying the said stamp tax provided in the said act of Congress in the mode and manner required by the said order of the said commissioners of railway in the State of Georgia.

We further request that the said Southern Express Company and its directors shall contest the validity, legality, and constitutionality of the action of the said railroad commissioners of the State of Georgia, as set forth in their said order of August 2, 1898, and protect the shareholders of the Southern Express Company by applying to a court of competent jurisdiction to determine the liability of the same company under the same, and also to take such further steps as may be necessary to protect the rights of the shareholders, for whom the corporation acts in carrying on its business.

Very truly yours,

W. B. DINSMORE, 100 shares.
C. GRAY DINSMORE,
By DUMONT CLARKE, *Agent*, 100 shares.
ESTATE OF W. B. DINSMORE,
By DUMONT CLARKE, 800 shares,
Executor and Trustee.

EXHIBIT B.

Meeting held at the office of the Southern Express Company, No. 12 West 23rd street, New York city, August 8, 1898, in pursuance of the call of the acting president.

Present: Messrs. H. J. O'Brien, M. F. Plant, and Henry Sanford, directors.

In the absence in Europe of the secretary, Mr. W. H. Hendee was requested to act as secretary.

A communication addressed to—

13 "Henry B. Plant, president, and to the board of directors "of the Southern Express Company, and also to the said "Southern Express Company, in its capacity as a corporation, created "by and existing under the laws of the State of Georgia," and signed by Messrs. W. B. Dinsmore and others, was read by the secretary, as follows:

"Please take notice that we are shareholders in the Southern Ex- "press Company to the amounts set opposite to our respective names, "hereto attached.

"We are informed that the company intends to voluntarily com- "ply with the requirements of the order of the railroad commission "of the State of Georgia, dated August 2, 1898, which order imposes "upon the Southern Express Company the duty of furnishing, at "its own expense, the revenue stamps required to be attached to "bills of lading or receipts before receiving and forwarding goods "tendered for shipment, the said stamp tax being imposed by the "act of Congress approved June 13, 1898, entitled 'An act to pro- "vide ways and means to meet war expenditures, and for other "purposes,' particularly specified in sections six and twenty-six, "Schedule A, thereof.

"We claim that the action of the railroad commission of the State "of Georgia is illegal, invalid, beyond their jurisdiction, unconstitu- "tional, null and void.

"As such shareholders in the Southern Express Company we "hereby protest against any action of the Southern Express Com- "pany and its directors in voluntarily complying with the said order "of the said railroad commissioners of the State of Georgia and their "construction of the provisions of the act of Congress as binding "upon the Southern Express Company, and we hereby request that "the Southern Express Company and its directors shall refrain from "voluntarily accepting the said order, or complying therewith, and "voluntarily paying the said stamp tax provided in the said act of "Congress in the mode and manner required by the said order of "the said commissioners of railway in the State of Georgia.

"We further request that the said Southern Express Company "and its directors shall contest the validity, legality, and constitu- "tionality of the action of the railroad commissioners of the State "of Georgia, as set forth in their said order of August 2, 1898, and "protect the shareholders of the Southern Express Company by "applying to a court of competent jurisdiction to determine the lia- "bility of the said company under the same, and also to take such

"further steps as may be necessary to protect the rights of

14 "the shareholders, for whom the corporation acts in carrying "on its business."

Thereupon, on motion, duly seconded, it was—

Resolved, That the board of directors deem it inexpedient to comply with the demand of Messrs. Dinsmore and the estate of W. B. Dinsmore on the ground that the failure to comply with the requirements of the order of the Georgia railroad commissioners August 2, 1898, would subject the company to litigation with the

authorities of the State of Georgia and the State railway commission, and the company run the risk of incurring penalties under the laws of Georgia and of so clouding its title to its corporate franchise and rights as to embar-ass its action.

On motion, duly seconded, it was further—

Resolved, That the company will notify the railroad commission of Georgia that while respectfully protesting against the legality and validity of its order of August 2, 1898, the company will abide by and perform the same, and also that the company will file its application to said commission to be allowed to collect from the shipper, in addition to the existing rates, sanctioned by the commission, the amount of war-revenue tax held by the commission to be payable by the company, and in aid thereof will present to the commission a renewed request for the suspension of the order of August 2, 1898, until decision has been rendered on such application.

On motion, duly seconded, it was further—

Resolved, That a copy of the foregoing resolutions shall be transmitted by the secretary of this meeting, duly certified, under the company's seal, to Messrs. W. B. Dinsmore and others.

On motion, duly seconded, the meeting was then adjourned.

Office of Southern Express Company.

NEW YORK, *August* 8, 1898.

I, W. H. Hendee, acting secretary, do hereby certify the foregoing to be a true copy of the minutes of a meeting of the directors of the Southern Express Company held this date.

In witness I have thereunto set my signature and the seal of said company this August the 8th, 1898.

W. H. HENDEE,
Acting Secretary.

EXHIBIT C.

Meeting held at the office of the Southern Express Com-
15 pany, No. 12 West 23rd street, New York city, August 29, 1898, in pursuance of the call of the acting president.

Present: Messrs. M. J. O'Brien, M. F. Plant, and Henry Sanford, directors.

In the absence of the secretary, Mr. E. M. Williams was requested to act as secretary.

The meeting being informed that the railroad commission of Georgia has denied the application of the company to be allowed to collect from the shipper, in addition to the existing rates sanctioned by the commission, the amount of the war-revenue tax held by the commission to be payable by the company, and that the company was now observing the Georgia railroad commission's rates on intrastate business in Georgia, and was, as to such business, paying the amount of the war-revenue tax without charging the same to the shipper or endeavoring to collect the same from the shipper, it was, on motion duly seconded—

Resolved, That the course pursued by the company in the foregoing particulars be, and the same is hereby, approved, as it is deemed expedient to comply with the orders of the railroad commission of Georgia in the premises in order to avoid the risk of incurring penalties under the laws of Georgia and of so clouding the company's title to its corporate franchise and rights as to embar-ass its action; and be it further

Resolved, That Messrs. W. B. Dinsmore and others, whose communication was considered at the board meeting held on the 8th instant, shall be notified by the acting secretary of the decision of the Georgia railroad commission and of the action taken thereon, as evidenced by the foregoing resolution.

On motion, duly seconded, the meeting was then adjourned.

E. M. WILLIAMS,
Acting Secretary.

Office of the Southern Express Company.

NEW YORK, *August* 29, 1898.

I, E. M. Williams, acting secretary, do hereby certify the foregoing to be a true copy of the minutes of a meeting of the directors of the Southern Express Company held this date.

In witness I have thereunto set my signature and the seal of said company this August the 29th, 1898.

E. M. WILLIAMS,
Acting Secretary.

16 UNITED STATES OF AMERICA:

Bill in Equity.

Circuit Court U. S., Southern Dist. of Ga., N. E. Division.

WM. B. DINSMORE ET AL.
vs.
THE SOUTHERN EXPRESS COMPANY ET AL.

Personally appeared Dumont Clarke, who, being duly sworn, doth depose and say that he is one of the complainants in the above-stated cause; that he has read the said bill and knows the contents thereof; that the facts set forth therein, so far as they purport to be stated on his own knowledge, are true, and so far as they purport to be stated on information and belief he believes them to be true.

DUMONT CLARKE.

Sworn to and subscribed before me this 25th day of October, 1898, in the city of New York.

J. J. BENNETT,
[NOTARIAL SEAL.] *Notary Public, Kings Co., N. Y.*

Certificate filed in New York county.

Endorsement: No. 29. Circuit court of the United States, southern district of Georgia, northeastern division. William B. Dins-

more *et al. vs.* The Southern Express Company *et al.* In equity. Original bill. Filed in office October 27, 1898. Geo. K. Calvin, deputy clerk. Frank H. Miller, sol'r for complainants.

Equity Subpœna to Appear and Answer.

UNITED STATES OF AMERICA,
Northeastern Division, Southern District of Georgia.

WILLIAM B. DINSMORE ET AL., Complainants,
and
THE SOUTHERN EXPRESS COMPANY ET AL., Defendants.
In Equity. No. 29.

The President of the United States of America to the Southern Express Company, Leander N. Trammell, Thomas C.
17 Crenshaw, Spencer R. Atkinson, and Joseph M. Terrell individually, and to Leander N. Trammell, Thomas C. Crenshaw, and Spencer R. Atkinson as railroad commissioners of the State of Georgia, and to Joseph M. Terrell as attorney general of the State of Georgia, Greeting:

For certain causes offered before the judges of the circuit court of the United States for the southern district of Georgia, in equity, you, and each of you, are hereby commanded and strictly enjoined that, laying all other matter aside and notwithstanding any other excuse, you personally be and appear at the clerk's office of the said court, in the city of Augusta, at rules to be had on the first Monday in December next, to answer to those things which shall then and there be objected to you in a bill in equity, filed October 27th, 1898, and to do further and receive what the said court shall have considered in that behalf, and this you may in nowise omit, under penalty of five hundred dollars; and have here this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 27th day of October, in the year of our Lord one thousand eight hundred and ninety-eight.

[SEAL OF COURT.] GEO. K. CALVIN,
Deputy Clerk.

MEMORANDUM.—The defendants are to enter their appearance in the suit above stated in the clerk's office on or before the day at which this writ of subpœna is returnable; otherwise the bill may be taken *pro confesso*.

GEO. K. CALVIN,
Deputy Clerk.

Endorsement: In the circuit court of the United States for the N. E. division, southern district of Georgia, December rules, 1898. William B. Dinsmore *et al.*, complainants, and The Southern Express Company *et al.*, defendants. In equity. Original subpœna in equity. Issued 27th day of October, A. D. 1898. Geo. K. Calvin, deputy clerk. Frank H. Miller, complainants' solicitor.

Marshal's Return.

I hereby certify that on the 28th day of October, 1898, at the city of Augusta, in my district, I personally served the within subpœna in equity upon the within-named The Southern Express Company by exhibiting to Hugh Dempsey, superintendent of said 18 company at Augusta, Ga., the within original, and at the same time leaving with him a copy thereof.

Augusta, Ga., Oct. 28th, 1898.

JOHN M. BARNES,
U. S. Marshal,
By GEO. H. THOMAS, *Deputy.*

Marshal's return filed Oct. 28, 1898.

GEO. K. CALVIN,
Deputy Clerk.

Marshal's Return.

(Endorsed on second original of foregoing writ of subpœna, issued for service in the northern district of Georgia.)

I hereby certi-y that on the 29th day of October, 1898, at the city of Atlanta, in my district, I personally served the within subpœna in equity upon the within-named Leander N. Trammell, Thomas C. Crenshaw and Spencer R. Atkinson, as individuals and as railroad commissioners of the State of Georgia, and upon the within-named Joseph M. Terrell as an individual and as attorney general of the State of Georgia, by exhibiting to each of them the within writ of subpœna and at the same time leaving with each of them a true copy thereof.

W. H. JOHNSON,
United States Marshal, Northern District of Georgia.

Marshal's return filed this 2nd day of November, 1898.

GEO. K. CALVIN,
Deputy Clerk.

Amendment to Original Bill.

Circuit Court of the United States, Southern District of Georgia, Northeastern Division.

WILLIAM B. DINSMORE ET AL.
versus
THE SOUTHERN EXPRESS COMPANY ET AL. } In Equity.

And now comes the plaintiff, and by way of amendment to the bill filed October 27, 1898, adds the word "junior" to the name of Thomas C. Crenshaw, where it appears in the introductory part of the petition and the prayer for process; and further amends the said prayer for process by interlining in the sixth (6th) line thereof the

words: "Comprising all the members of and constituting the
19 said railroad commission of the State of Georgia," so that the said prayer for process will read as follows:

"And may it please your honors to grant unto your orators the writ of subpœna of the United States of America, directed to the said defendants, The Southern Express Company, Leander N. Trammell, Thomas C. Crenshaw, Jr., and Spencer R. Atkinson, individually and as railroad commissioners of the State of Georgia, comprising all the members of and constituting the said railroad commission of the State of Georgia, and Joseph M. Terrell, individually and as the attorney general of the State of Georgia, commanding them and each of them, on a certain day and under a certain penalty to be therein inserted, to be and appear before your honors in this honorable court, and then and there full, true, direct and perfect answer make to all and singular the premises, and further to perform and abide by such further order and decree as to your honors shall seem meet.

"And your orators in duty bound will ever pray, etc."

FRANK H. MILLER,
Compl'ts' Sol'r.

UNITED STATES OF AMERICA, }
Southern District of Georgia, Northeastern Division. }

Personally appeared Frank H. Miller, who being duly sworn says he is complainants' solicitor. That the facts set forth in the foregoing amendment are true. That he has been informed by the deputy clerk of the court that no copy of the bill has been taken out of the clerk's office, and that but one copy of the subpœna issued in the cause under the duplicate or second original for the northern district of Georgia was issued by him and served on the respective railroad commissioners.

Sworn to and subscribed before me this November 8th, 1898.

FRANK H. MILLER.
GEO. K. CALVIN,
U. S. Commissioner, Southern District of Ga.

Endorsement: No. 29. Circuit court of the United States, southern district of Georgia, northeastern division. William B. Dinsmore *et al. vs.* The Southern Express Company *et al.* In equity. Amendment to original bill. Filed in office November 8th, 1898. Geo. K. Calvin, deputy clerk.

20 *Equity Subpœna to Appear and Answer.*

UNITED STATES OF AMERICA,
Northeastern Division, Southern District of Georgia.

WILLIAM B. DINSMORE ET AL., Complainants,
and
THE SOUTHERN EXPRESS COMPANY ET AL., Defendants.
In Equity. No. 29.

The President of the United States of America to the Southern Express Company, Leander N. Trammell, Thomas C. Crenshaw, Junior, and Spencer R. Atkinson, individually and as railroad commissioners of the State of Georgia, comprising all the members of and constituting the said railroad commission of the State of Georgia, and Joseph M. Terrell, as attorney general of the State of Georgia, Greeting:

For certain causes offered before the judges of the circuit court of the United States for the southern district of Georgia, in equity, you and each of you are hereby commanded and strictly enjoined that, laying all other matter aside and notwithstanding any other excuse, you personally be and appear at the clerk's office of the said court, in the city of Augusta, at rules to be had on the first Monday in December next, to answer to those things which shall then and there be objected to you in a bill in equity filed Oct. 27, 1898, in the case above stated, and this day amended by adding the word Junior after the name of Crenshaw, and to the prayer for process the words "comprising the members of and constituting the said railroad commission of the State of Georgia;" and to do further and receive what the said court shall have considered in that behalf, and this you may in nowise omit, under penalty of five hundred dollars; and have here this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 8th day of November, in the year of our Lord one thousand eight hundred and ninety-eight.

[SEAL OF THE COURT.] GEO. K. CALVIN,
Deputy Clerk.

MEMORANDUM.—The defendants are to enter their appearance in the suit above stated in the clerk's office on or before the day at which this writ of subpœna is returnable; otherwise the bill may be taken *pro confesso*.

GEO. K. CALVIN,
Deputy Clerk.

21 Endorsement: In the circuit court of the United States for the northeastern division, southern district of Georgia, December rules, 1898. William B. Dinsmore *et al.*, complainants, and The Southern Express Company *et al.*, defendants. In equity. Original subpœna in equity upon amendment to bill. Issued 8th day of November, A. D. 1898. Geo. K. Calvin, deputy clerk. Frank H. Miller, complainants' solicitor.

This is a copy of the subpœna sued out of the proper district.

FRANK H. MILLER,
Compl'ts' Sol'r.

Marshal's Return.

I hereby certify that on the 10th day of November, 1898, at the city of Atlanta, in my district, I personally served the within subpœna in equity upon the within-named Leander N. Trammell and Spencer R. Atkinson, members of the railroad commission of the State of Georgia; also upon Leander N. Trammell, chairman of the said commission, and upon the within-named Joseph M. Terrell as attorney general of the State of Georgia, by exhibiting to each of them the within writ of subpœna and at the same time leaving with each one of them as such commissioners and the said Trammell as chairman and said attorney general, a true copy thereof.

W. H. JOHNSON,
U. S. Marshal, N. D. of Ga.

I hereby certify that on the 14th day of November, 1898, in the city of Atlanta, in my district, I personally served the within subpœna in equity upon the within-named Thomas C. Crenshaw, Jr., by exhibiting to him the within writ of subpœna and at the same time leaving with him as such railroad commissioner a true copy thereof.

W. H. JOHNSON,
U. S. M., N. D. of Ga.,
By W. C. THOMAS, *Deputy.*

Marshal's return filed November 15th, 1898.

GEO. K. CALVIN,
Deputy Clerk.

22 *Precept for Appearance.*

STATE OF GEORGIA, ATTORNEY GENERAL'S OFFICE,
ATLANTA, *Nov.* 22, 1898.

Hon. Geo. K. Calvin, deputy clerk U. S. court, Augusta, Ga.

DEAR SIR: Please enter my appearance in the case of William B. Dinsmore, *et al., vs.* Southern Express Company, *et al.*, as of counsel for the railroad commission and attorney general, who are named as parties defendant.

Please acknowledge receipt of this request, and oblige,

Yours very truly, J. M. TERRELL.

Filed November 23rd, 1898.

GEO. K. CALVIN,
Deputy Clerk.

Equity Order for Appearance.

United States Fifth Circuit Court, Southern District of Georgia, Northeastern Division.

WILLIAM B. DINSMORE ET AL., Complainants,
and
THE SOUTHERN EXPRESS COMPANY ET AL., Defendants. } In Equity.

On filing precept in this cause, and on motion of J. M. Terrell, solicitor for the railroad commission and the attorney general,

Ordered, that his appearance as solicitor for said defendants be, and the same hereby is entered, and that the cause be now docketed for said defendants.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this twenty-third day of November, A. D. 1898.

[SEAL OF COURT.] GEO. K. CALVIN,
Deputy Clerk.

Endorsement: U. S. fifth circuit court, southern district of Georgia, N. E. division. Wm. Dinsmore *et al.*, complainants, and The Southern Express Company *et al.*, defendants. In equity. 23 Precept for appearance, and order thereon. Filed and entered this 23rd day of November, 1898. Geo. K. Calvin, deputy clerk. J. M. Terrell, solicitor for defendants within named.

Demurrer of Defendants L. N. Trammell et al.

Circuit Court of the United States, Southern District of Georgia, Northeastern Division.

WILLIAM B. DINSMORE ET AL.
vs.
THE SOUTHERN EXPRESS COMPANY ET AL. } In Equity.

Demurrer of defendants L. N. Trammell, Thomas C. Crenshaw, Jr., and Spencer R. Atkinson, composing the railroad commission of the State of Georgia, individually and as railroad commissioners, and Joseph M. Terrell, individually and as attorney general of said State, to the bill of complaint of the above-named plaintiffs and the amendment thereto.

These defendants by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint, and amendment thereto, contained, to be true in such manner and form as the same are therein set forth and alleged, doth demur to the said bill and amendment. And for cause of demurrer showeth:

First. That it appeareth by the said bill and amendment that they are not entitled to the relief prayed for therein against these defendants.

Second. That there is no equity in said bill and amendment, and for special cause of demurrer these defendants showeth:

First. That complainants have full, adequate and complete remedy at common law. (*a.*) Because if the order of the said railroad commission complained of in said bill is unauthorized by the constitution and the laws it is a nullity and would be so held in the suit or suits for the recovery of the penalty for the violation of the rules and orders of the said commission as provided by the laws of Georgia. (*b.*) Because if the said order of the railroad commission is unjust and unreasonable no penalty can or will be imposed by the court having jurisdiction of the suit to recover such penalty for the violation of said order.

Second. That the court has no jurisdiction of the matters set forth in complainants' bill, or to grant relief in the premises. (*a.*)
24 Because the superior courts of the State of Georgia have exclusive jurisdiction of the penalty suits authorized to be brought against express companies for violating the rules and orders of the railroad commission, and are alone empowered to fix the penalties prescribed by law for a violation of the said rules and orders. (*b.*) Because the acts complained of against these defendants as set forth in said bills are clearly within the jurisdiction and the discretion of the railroad commission of Georgia, under the constitution and laws of said State, and the courts have no jurisdiction to control said commission in such matters, nor to restrain by injunction the exercise of such discretion, it not appearing from the allegations in said bill that there was any denial of the constitutional rights of complainants or of the Southern Express Company, or any gross abuse of discretion. (*c.*) Because the power to prescribe just and reasonable rates is legislative and not judicial, and therefore the courts have no jurisdiction to inquire whether such power *were* well and properly exercised by the said commission; especially is this true on the presentation of the facts as set out in complainants' bill.

Third. That complainants' bill is in effect a suit against the State of Georgia without her consent, and is contrary to the eleventh amendment to the Constitution of the United States, and that on this account, therefore, the court has not jurisdiction. (*a.*) Because under the law the penalty suits above referred to are required to be brought in the name of the State and the sums recovered are to be paid into the State treasury to be used as the General Assembly may direct.

Wherefore, and for divers other good causes of demurrer, these defendants doth demur thereto. And they pray the judgment of this honorable court whether they shall be compelled to make any answer to said bill; and they humbly pray to be hence dismissed with their reasonable costs in this behalf sustained.

J. M. TERRELL,
Solicitor and of Counsel for Defendants in Whose Behalf this Demurrer is Made.

I hereby certify that the foregoing demurrer is in my opinion well founded in law.

J. M. TERRELL,
Of Counsel as Above Mentioned.

STATE OF GEORGIA, *Fulton County.*

ATLANTA, GA., *December 1st*, 1898.

L. N. Trammell, being duly sworn, deposes and says: I am
25 one of the above-named defendants, and the foregoing demurrer is not filed for delay.

Sworn to and subscribed before me this 1st day of December, 1898.

L. N. TRAMMELL.

[SEAL.] J. D. MASSEY,
Notary Public, Fulton County, Georgia.

Endorsement: Circuit court of the United States, southern district of Georgia, northeastern division. William B. Dinsmore *et al. vs.* The Southern Express Co. *et al.* In equity. Demurrer of defendants L. N. Trammell *et al.* Filed in office this 2nd day of December, 1898. Geo. K. Calvin, deputy clerk. J. M. Terrell, of counsel for said defendants.

Demurrer of Defendant J. M. Terrell.

Circuit Court of the United States, Southern District of Georgia, Northeastern Division.

WILLIAM B. DINSMORE ET AL. *vs.* THE SOUTHERN EXPRESS COMPANY ET AL. } In Equity.

Special demurrer of defendant Jos. M. Terrell, individually and as attorney general of Georgia.

In addition to the grounds set forth in the general and special demurrer which this defendant in connection with L. N. Trammell, T. C. Crenshaw and S. R. Atkinson has this day filed he by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint to be true in such manner and form as the same are therein set forth and alleged, doth further specially demur to the *specially demur* to the said bill. And for cause of special demurrer showeth,

First. That it appeareth by the plaintiffs' own showing by the said bill that they are not entitled to the relief prayed by the said bill against this defendant. (*a*) Because under the law he neither individually, nor as attorney general, would or could bring a suit against the Southern Express Company to recover the penalty prescribed by law for a violation of the rules and orders of the railroad commission, unless the said commission ordered such suit, and if the court enjoins the commission from ordering same no suit
26 could be brought. (*b*) Because it is necessary to presume that the railroad commission will violate the orders of this

court before this defendant individually or officially could bring such suit, which presumption is unauthorized and illegal.

Wherefore, he prays the judgment of this honorable court whether he shall be compelled to make any answer to the said bill; and he humbly prays to be hence dismissed with his reasonable costs in this behalf expended.

J. M. TERRELL,
Solicitor and Counsellor in Propria Persona.

I hereby certify that the foregoing demurrer is in my opinion well founded in law.

J. M. TERRELL,
Solictor and Counsellor.

Atlanta, Ga., Dec. 1, 1898.

Endorsement: Circuit court of the United States, southern district of Georgia, northeastern division. William B. Dinsmore *et al. vs.* The Southern Express Co. *et al.* Demurrer of defendant J. M. Terrell. Filed in office this second day of December, 1898. Geo. K. Calvin, deputy clerk. J. M. Terrell, of counsel for defendant.

Order Setting Down Demurrers for Hearing.

January Rules, 1899.

WILLIAM B. DINSMORE ET AL.
vs.
THE SOUTHERN EXPRESS COMPANY ET AL.

Order setting down demurrers for hearing.

And now on motion of Frank H. Miller, Esq., solicitor for complainants in the above-stated cause, it is ordered that the demurrers of defendants in the above-stated cause be and the same are hereby set down for hearing and argument at the conveniences of the court.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Augusta, this 2nd day of January, A. D. 1899.

[SEAL OF COURT.] GEO. K. CALVIN,
Deputy Clerk.

27 Endorsement: U. S. circuit court, N. E. division, southern district of Ga. Wm. B. Dinsmore *et al. vs.* The Southern Express Company *et al.* Order setting down, at January rules, 1899, demurrers for hearing, etc. Filed this 2nd day of January, 1899. Geo. K. Calvin, deputy clerk.

Extracts from the 26th Annual Report of the Railroad Commission.

The following extracts from the 26th Annual Report of the Railroad Commission of Georgia, for 1898, were offered in evidence by the railroad commissioners and admitted:

Merchandise Rates Per Hundred and Graduated Rates for Packages Weighing Less Than One Hundred Pounds.

As fixed by the railroad commissioners of Georgia.

Distance.	Merchandise rates per 100 lbs.															
		Rates per 100 lbs.	30	40	50	60	70	80	90	100	105	115	120	130	135	140
		Miles.	20	40	60	80	100	130	160	180	200	250	300	350	400	450
Miles.	Cents.	Packages less than 100 lbs.														
1 to 20	30	Over 0, not over 5	25	25	25	25	25	25	25	25	25	25	25	25	25	25
21 to 40	40	Over 5, not over 10	25	25	25	25	25	30	30	30	30	30	35	35	40	45
41 to 60	50	Over 10, not over 20	25	25	25	25	30	30	30	30	35	35	40	45	45	50
61 to 80	60	Over 20, not over 30	25	25	25	30	30	35	35	40	45	50	50	50	55	55
81 to 100	70	Over 30, not over 40	25	25	30	35	40	45	45	50	50	60	65	65	70	75
101 to 130	80	Over 40, not over 50	25	30	35	40	45	50	55	60	65	70	75	80	85	90
131 to 160	90	Over 50, not over 60	25	30	35	45	55	60	65	70	75	85	95	100	105	110
161 to 180	1.00	Over 60, not over 70	25	35	45	50	60	70	75	80	95	100	110	120	130	130
181 to 200	1.05	Over 70, not over 80	30	40	50	60	70	75	90	100	105	115	120	130	135	140
201 to 250	1.15	Over 80, not over 90	30	40	50	60	70	80	90	100	105	115	120	130	135	140
251 to 300	1.20	Over 90, not over 100	30	40	50	60	70	80	90	100	105	115	120	130	135	140

Packages weighing five pounds and under shall not be charged more than 25 cents by one company for any distance within this State; but when such packages are handled by two or more companies, each company may charge 25 cents, less 20 per cent.

Tariff B.

Governing perishables, etc.

Rates per Hundred Pounds and Graduated Rates for Packages Weighing Less than One Hundred Pounds.

As fixed by the railroad commission of Georgia.

Miles.	Rates per 100 lbs.	Rates per 100 pounds.	30	30	35	40	45	50	55	60	65	70	75	80	85	90
		Miles.	20	40	60	80	100	130	160	180	200	250	300	350	400	450
	Cents.	Packages less than 100 lbs.														
1 to 450	....	Over 0, not over 5.	25	25	25	25	25	25	25	25	25	25	25	25	25	25
1 to 20	30	Over 5, not over 10.	25	25	25	25	25	25	25	30	30	30	35	40	45	45
21 to 40	30	Over 10, not over 20.	25	25	25	25	25	25	30	30	35	35	40	45	45	45
41 to 60	35	Over 20, not over 30.	25	25	25	25	25	30	30	35	35	40	45	50	55	55
61 to 80	40	Over 30, not over 40.	25	25	25	25	30	30	35	40	40	45	50	55	60	65
81 to 100	45	Over 40, not over 50.	25	25	25	30	30	35	40	40	45	50	55	60	65	70
101 to 130	50	Over 50, not over 60.	25	25	30	30	35	40	40	45	50	55	60	65	70	75
131 to 160	55	Over 60, not over 70.	25	30	30	35	40	45	45	50	55	60	65	70	75	80
161 to 180	60	Over 70, not over 80.	30	30	35	40	45	45	50	55	60	65	70	75	80	85
181 to 200	65	Over 80, not over 90.	30	30	35	40	45	45	50	55	60	65	70	80	85	90
201 to 250	70	Over 90, not over 100.	30	30	35	40	45	50	55	60	65	70	75	80	85	90

NOTE.—Packages weighing five pounds and under shall not be charged more than 25 cents by one company for any distance within this State, but when such packages are handled by two or more companies, each company may charge 25 cents, less 20 per cent.

TARIFF E.

Governing the following perishables when carried by express companies:

Dressed poultry, fresh fish, fresh meat, and sausages.

Rates per One Hundred Pounds and Graduated Rates for Packages Weighing Less than One Hundred Pounds on Above Articles.

As fixed by the railroad commission of Georgia.

Distance.	Rates per 100 lbs.	Rates per 100 pounds.	25	25	25	27	30	35	40	43	45	50	54	58	60	63
		Miles.	20	40	60	80	100	130	160	180	200	250	300	350	400	450
Miles.	Cents.	Packages less than 100 lbs.														
1 to 450	....	Over 0, not over 5	25	25	25	25	25	25	25	25	25	25	25	25	25	25
1 to 20	25	Over 5, not over 10	25	25	25	25	25	25	25	25	25	27	28	30	33	35
21 to 40	25	Over 10, not over 20	25	25	25	25	25	25	25	25	27	28	30	33	35	35
41 to 60	25	Over 20, not over 30	25	25	25	25	25	25	25	27	28	30	33	35	38	40
61 to 80	27	Over 30, not over 40	25	25	25	25	25	25	28	30	30	35	38	40	43	45
81 to 100	30	Over 40, not over 50	25	25	25	25	25	28	30	33	35	38	40	45	45	50
101 to 130	35	Over 50, not over 60	25	25	25	25	30	30	33	35	38	40	45	45	50	55
131 to 160	40	Over 60, not over 70	25	25	25	27	30	33	35	40	40	45	45	50	55	60
161 to 180	45	Over 70, not over 80	25	25	25	27	30	35	40	43	45	50	50	58	60	63
181 to 200	45	Over 80, not over 90	25	25	25	27	30	35	40	43	45	50	50	58	60	63
201 to 250	50	Over 90, not over 100	25	25	25	27	30	35	40	43	45	50	54	58	60	63

31 *Rules.*

Rule 1.

The above tariffs are maximum rates, and will apply to all express companies doing business within the State of Georgia, and will be governed by the rules and regulations of the said express companies as far as said rules are applicable to the business done within the State of Georgia, and are not in conflict with the rules adopted by the commission governing express companies.

Rule 2.

All charges on freights weighing more than five pounds and passing over two or more railroads under the same management and control, by lease, ownership, or otherwise, shall be based on continuous mileage, but when said shipments pass over two or more roads not under the same management and control, by lease, ownership, or otherwise, 30 per cent. may be added to the express standard tariff, based on continuous mileage. When said shipments are handled by two or more express companies, each company may charge its local less ten per cent.

Packages weighing five pounds and under shall not be charged more than 25 cents by one company for any distance within this State, but when such packages are handled by two or more companies, each company may charge 25 cents less 20 per cent.

Rule 3.

The express companies are directed to have published and posted at all their offices in the State of Georgia the said classifications, rates, and rules, with such explanations as are necessary for a full understanding of the same.

Rule 4.

Graduated rates apply to matter weighing less than one hundred pounds.

Rule 5.

Two or more packages weighing each 10 pounds or over, forwarded by one shipper at the same time to one consignee, may be charged for on the aggregate weight as above. Packages
32 weighing less than 10 pounds each shipped as in the foregoing section, may be aggregated, provided they are estimated and charged for as weighing 10 pounds each. Actual weight only must be entered on the waybill. If articles of different classes are aggregated, the charge may be made at the rate applying to the highest class.

Rule 6.

Valuation charges.—When the value of any merchandise shipment (C. O. D., or otherwise) exceeds $50.00, the following additional charge may be made on value (charge for value whether insured or not): When merchandise rate is $1.00 or less per 100

pounds, 5 cents for each $100 value, or fraction thereof. When merchandise rate exceeds $1.00 and not more than $3.00 per 100 pounds, 10 cents for each $100.00 value, or fraction thereof. These rates apply only to packages or shipments of merchandise, jewelry, and valuable papers.

Rule 7.

If C. O. D. matter is refused, or cannot be delivered, the shipper must be immediately notified, and if not disposed of within thirty days after such notice, it may be returned, subject to charge both ways.

Rule 8.

Gunpowder, dynamite, kerosene, benzine, nap-tha, gasoline, matches, and all other explosives or dangerous inflammable oils, acids, or materials may not be received for transportation.

Rule 9.

Fancy poultry, pet stock or dogs that have paid double merchandise rates to fairs and exhibitions may be returned free, if accompanied by a certificate from the secretary that they are being returned to the original owner.

Rule 10.

No express office where express business is done in this State shall be discontinued or abolished without first obtaining the consent of the commission upon application duly filed by said company, wherein shall be cited the reasons stated.

33 Rule 11.

When ice is used for preservation of shipments of commodities in Tariff E, including oysters in shell, deduct twenty-five per cent. (25) from the gross weight.

Opinion of the Court.

In the Circuit Court of the United States for the Northeastern Division of the Southern District of Georgia.

WILLIAM B. DINSMORE ET AL.
vs.
THE SOUTHERN EXPRESS COMPANY ET AL. } In Equity. Bill, etc. Opinion.

Frank H. Miller, solicitor for complainants.

Fleming G. Du Bignon, solicitor for the Southern Express Company.

J. M. Terrell, attorney general of Georgia, for the railroad commission of Georgia, its members, and himself.

Statement of the Case.

William B. Dinsmore, C. Gray Dinsmore, and William B. Dinsmore, C. Gray Dinsmore and Dumont Clarke, as executors of and trustees under the will of William B. Dinsmore, deceased, stockholders of the Southern Express Company, filed their bill with the recitation of facts following: The Southern Express Company is a Georgia corporation. They are its shareholders to the amount of fifty thousand dollars. They are citizens of New York. The railroad commission of Georgia by order passed the 2nd of August, 1898, directed that the Southern Express Company pay the war stamp tax on its manifests and bills of lading required by the act of Congress of the 13th day of June, 1898. By the same order the Southern Express Company was directed to conform therewith without making any demand on shippers for the payment of the tax, and to notify the commission of its compliance in five days from that date, and in default thereof the penalties of the Georgia statutes were threatened. The complainants desired that the express company should refuse to pay the tax, and have the question of its liability settled by the courts and formally requested the company to take this action. The company, however, declined to comply
34 with this request, giving as the reason therefor that it was advised not to subject itself to the risk of incurring the severe penalties imposed by the State legislation and which could be enforced by the commission as threatened, and for the further reason that the charter and franchises of the Company might be impaired by State action. The bill is filed against the Southern Express Company, the railroad commission of Georgia and its members and the attorney general of the State. The attorney general representing himself and the railroad commission demurred to the bill, and the cause was heard upon bill and demurrer. Other facts essential to an understanding of the case may be gathered from the decision of the court.

SPEER, *Judge*:

The parties actually contesting in this proceeding are non-resident stockholders of the Southern Express Company on the one side and the members of the railroad commission and the attorney general of Georgia on the other. The Southern Express Company, a Georgia corporation, is also made a party defendant, and injunction is prayed against it. It may with more propriety, however, be regarded as party plaintiff. It was made to take a position as defendant certainly for one reason and perhaps for another also. It had declined to test in the courts the question whether the war stamp tax on its bills of lading and manifests is payable by the shipper or by itself. This was done because of the enormous penalties from one thousand to five thousand dollars fine in each case with which it was solemnly threatened by the railroad commission, unless in five days it abandoned its contention that the shipper must pay the tax, accept all shipments and itself furnish, affix and cancel the stamps. This is

plain from the resolution of its directors in which they state that "it is deemed expedient to comply with the orders of the railroad commission of Georgia in the premises in order to avoid penalties under the laws of Georgia and so clouding the company's title to its corporate franchises and rights as to embar-ass its action." It is possible also that being a resident corporation the jurisdiction of the court here may have been questioned. The matter to be determined, however, involving the imposition of United States taxation, by State authorities, we may be justified in concluding that the United States court has jurisdiction concurrent with that of the State courts to hear the parties, whether they are citizens of this or of other States. The Southern Express Company then, so far as
35 the jurisdiction can be affected, might well have taken its appropriate position as plaintiff. It cannot be said, however, in view of the averments of the bill and the character of the demurrer that the express company is in a position embar-assing to the court in the determination of the issues of law presented by the pleadings. Those issues are not so extensive as the demurrer of the commission, and the strong, ingenious argument of the attorney general would seem to indicate. They do not for instance render necessary a construction by the court of the act of Congress imposing the war-stamp tax, nor any clause of it. Indeed there are no parties to the record whose demand for the construction of the clause imposing the tax must be regarded. The complainants so far as they are individually concerned, do not ask it. In the brief filed by their counsel, they expressly suggest that the construction of the revenue act is not involved. It is true they pray, that the express company may be restrained from voluntarily complying with the provisions of the order of the railroad commission directing it to furnish the stamps to pay the tax, but surely an injunction to this effect would be superfluous. There was and is and will be nothing "voluntary" to be discovered in the action of the express company in this regard. It not only refused to pay the tax, but when ordered to do so by the commission complied most reluctantly and for fear of the more serious impositions the commission had in store for it. Why then should the court parade its authority to enjoin the express company not to make payments it would be delighted to escape?

Nor can it be said that the State has a right to ask a construction to the act. It has no pecuniary interest at stake. To adopt the language of the Supreme Court in a kindred case, Reagan *vs.* Trust Company, 154 U. S., p. 390, "There is a sense, doubtless, that the State is interested in the question, but only in a governmental sense." States however do not enter courts in a governmental sense. They cannot ordinarily be brought into court, but when they condescend to come, they come as do ordinary litigants, and they are not heard unless they have an ascertainable definite interest in the litigation. Here, moreover, the State is not before the court. The commission is here, but the commission does not contend "*L'etat c'est moi*" as did Louis le Grande Monarque. We shall presently see that the commission has as little concern with the construction

of the revenue law as the State which is not before the court. It is true the learned attorney general in his brief states that the demurrer presents this question: "Does the act of Congress levy the stamp tax upon the shipper or express company or is it a general or floating tax?" Now if the attorney general of Georgia
36 were the Attorney General of the United States and was engaged in an effort to enforce the payment of the United States tax from the Southern Express Company, his proposition would probably require judicial determination. The fact however that he appears in this case as the attorney general of the State betrays how untenable is his position. This revenue tax is imposed by the United States. It affects all the people of all the States. It is national in its character, and "admits and requires uniformity of regulation and enforcement in all of the States." It follows that its distribution, apportionment, collection and enforcement is not within the administrative control of the authorities of a particular State. The respective spheres of action of the State and United States courts to use the apposite illustration of Chief Justice Brown, in Hines and Hobbs *vs.* Rawson, 40 Ga., p. 356, are each "as far beyond the reach of the other as if the line between them was traced by landmarks and monuments visible to the eye." Indeed, the action of the railroad commission as recited in the bill and admitted by the demurrer is not only an appropriation of functions belonging exclusively to officials of the United States charged with the collection of the tax, but it is an expansion of its own authority as defined by the law of the State. This is to be found in section 2217 of Civil Code of Georgia, and provides that all express and telegraph companies doing business in whole or part in this State "shall be under the control of the railroad commission of Georgia who shall have full power to regulate the prices to be charged * * * for any service performed by any such company or persons, etc." All of the powers of the commission relative to railroads are extended by this legislation to include telegraph and express companies. Without quoting the voluminous enactments defining the powers of the railroad commission, it will be enough to say that like the section of the code quoted above, so far as they are germane to this controversy, they relate to the fixation of rates or prices for transportation or conveyance. In so far as they are penal in effect, under the familiar rule they must of course be strictly construed. Bearing in mind this cardinal canon of construction with regard to penal legislation, how unprecedented seems that latitudinous interpretation which would make the punishment fixed by the statute apply to the failure of a corporation to pay a disputed stamp tax imposed by the United States upon a written evidence of shipment, required by the United States. This revenue exaction is no part of a rate for the shipment of express matter. It is no part of the price for "a service rendered" the shipper. It is a tax for national purposes and its payment or collection is in no sense directly or indirectly within the sphere "of a State administrative board."

Like the tax on distilled spirits, this is an internal-revenue
37 tax. Should the express company ship a package of any character in the absence of this stamp on the bill of lading,

it would incur a penalty of $50. If it should accept and knowingly "remove" or ship a package of distilled spirits unless it also bore the stamp required by the law, it would be guilty of an infamous offense, and its officers punishable by imprisonment in the penitentiary. Now has the railroad commission control over the shipment of an unstamped cask of liquor? Has it authority to direct that the express company and not the distiller shall pay for and attach the stamp? Has it any authority to threaten the imposition of its crushing penalties on the express company, and thus compel it to remove the liquor before the distiller has attached the stamp which is the evidence that the tax thereon has been paid? This will scarcely be maintained. But in either case the duty of the express company must of necessity be determined by the construction of the United States law. The courts of the State may construe such laws and make their construction effective, unless it should be denied by the courts of the United States, but the commission has no such power, and yet in this case it has gravely construed the act of Congress and issued its mandate accordingly. There can be no doubt that this is a great disadvantage to the express company in this State. It is denied its day in court, and cannot without assuming unwarrantable hazard proceed to test the disputed question of its liability for this tax, as other express companies have done elsewhere. The commission might well have adopted the procedure of the railroad commission of Missouri, relating to the same tax. The Missouri commission were also of the opinion that the tax was payable by the company, but in their order upon the subject, they declared:

"The act referred to however, does not definitely state by whom the required stamp shall be affixed, nor as the commissioners are informed, does the internal-revenue department decide as regards this question. If the stamp must be paid for by the shipper, the aggregate charge to him is increased by the amount paid for the stamp, and so far as he is concerned there is an increase in the rate. But the express companies do not increase their transportation rates, and claim that the stamp required has nothing to do with the service, but is for an entirely separate transaction, which the law requires shall be paid for by some one, as yet undecided, and that after the completion of this separate transaction, the transportation service begins, and for which no more than the legal charge is made. The question to be decided is, by whom must the expense of the required stamp be borne. The opinion of the commissioners is as before stated, but their opinion in this case is not law,
38 nor would it be of any effect in deciding the matter. The question is now in the courts for settlement, and until finally decided, must remain an open one. Should the decision of the courts be adverse to the express companies, and afterwards rates should be increased by them to cover the additional expense incurred by reason of the tax, then the commission would have full jurisdiction, and after hearing, could, if found proper, restore the old rates. As the matter stands, there is no increase in the rate tariffs of the express companies, and as regards the question of lia-

bility for the cost of the stamp required, commissioners decide they have no jurisdiction." How clear, conservative and equitable is this announcement. Neither the shippers nor the company are hindered in their approach to the courts. No fulmination is directed at either. How is it in Georgia? A corporation contributing daily to the comfort and convenience of thousands and doing much for the advancement of the State is practically excluded from the courts, or if it should seek to maintain therein its conception of the law for even a single day, after the five days' grace accorded by the commission, it is threatened with penalties which if imposed upon its conduct of business for a half day would involve it in irretrievable bankruptcy and ruin.

It is insisted, however, by the attorney general, that this court has no jurisdiction to grant any of the plaintiffs' prayers. The argument is that at best the action of the commission complained of is merely a reduction of rates; whether the reduction is reasonable or not is exclusively to be determined by the State courts, in no case can the court enjoin penalty suits; that the company has an adequate defense at law; that in no case except in bankruptcy is an injunction to be granted by a court of the United States to stay proceedings in the State courts and that this is a suit against the State. Many cases are marshaled in support of these propositions. The fundamental misapprehension which has led the attorney general to this incorrect contention and misapplication of precedents seems to proceed from his omission to perceive that the action taken by the commission is not merely unreasonable, but is unauthorized, null and void. Now it cannot successfully be disputed that the courts are open to citizens of the State to protect their property from the unauthorized action of officials and in many cases the Supreme Court of the United States has held that "whenever a citizen of a State can go into the courts of a State to defend his property against the illegal acts of its officers, a citizen of another State may invoke the jurisdiction of the Federal courts to maintain a like defence. A State cannot tie up a citizen of another State, having property rights within its territory invaded by unauthorized acts of its own officers to
suits for redress in its own courts." 169 U. S., p. 517, and
39 authorities cited. The commission then is not above the law in either jurisdiction. Reagan *vs.* Farmers' Loan & Trust Company, 154 U. S., p. 364 (Texas Commission case); Covington, etc., *vs.* The Turnpike Company, 164 U. S, p. 592 (Turnpike case); Smith *vs.* Ames, 169 U. S., p. 516 (Nebraska case). It will be found that these cases, and many others cited by the Supreme Court in its opinions, afford decisive and reiterated refutation to that reasoning intended to defeat the plaintiff's application for injunction against the commission. The Supreme Court holds that "the adequacy or inadequacy of the remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of the Federal court is not to be conclusively determined by the statutes of the particular State in which suit may be brought." That "the wise policy of the Constitution gives him a choice of tribunals," "that stockholders and incorporations may ask for a decree enjoining the

illegal action of the commission upon the ground that it is unreasonable, unauthorized or is repugnant to the Constitution of the United States." That "the courts of the United States sitting in equity can make a comprehensive decree covering the whole ground of controversy and thus avoid the multiplicity of suits that would inevitably arise under the statute." This holding is precisely in point. It is found in the invaluable opinion of Associate Justice Harlan in Smith *vs.* Ames, *supra*. There the company was as in this case, made liable not only to individual process for every act, matter or thing required to be done, but to a fine of from one thousand to five thousand dollars for the first offense. It is further held that "the transactions with these corporations are so numerous and varied that the interference of equity could well be justified upon the ground that a general decree according to the prayers of the bill would avoid a multiplicity of suits, giving a remedy more certain and efficacious than could be given in any proceeding instituted against the company in a court of law, for a court of law could only deal with each separate transaction involving the rates to be charged for transportation. The transactions of a single week would expose any company questioning the validity of the statute to a vast number of suits by shippers, to say nothing of the heavy penalties named in the statute. Only a court of equity is competent to meet such an emergency and determine once for all and avoid a multiplicity of suits, matters that affect not simply individuals but the interests of the entire community." In the same line of decisions summed up in the case just cited, the argument that the proceeding is against the State and therefore illegal, is also judicially confuted. The Supreme Court holds that the suits are not against the State, but against certain individuals charged with the administration of a State enactment which it is alleged cannot be enforced without violating the constitutional rights of the plaintiff.

In view of these repeated declarations of the Supreme Court of the United States, it is obligatory upon this court to enjoin the enforcement of the order of the railroad commission oppressive to the Southern Express Company, and injurious to its stockholders. This must be done in order that the management of this business, important to the public, may be admitted to the judicial tribunals of the State and of the United States upon a footing of equality with other litigants. The averments of the bill, taken with the brief of counsel, as we have said, at present do not call for a construction of the act of final determination of the liability of the defendant company or the shipper to pay it. Upon this preliminary hearing the decision will therefore be confined to matters distinctly in issue. The prayer for temporary injunction against the express company will be denied, and the railroad commission will be enjoined conformably to the prayers of the bill. It is not deemed necessary to enjoin the attorney general for it is presumed that this eminent lawyer, who is the official head of the bar of the State, will without such injunction accord all appropriate respect to the decision of the court.

Endorsement: United States circuit court, northeastern division, southern district of Georgia. William B. Dinsmore *et al. vs.* The Southern Express Company *et al.* Opinion of the court. Filed this 8th day of March, 1899, at 9 o'clock a. m. Geo. K. Calvin, deputy clerk.

Order of Court on Application for Injunction, etc.

In the Circuit Court of the United States for the Northeastern Division of the Southern District of Georgia.

WILLIAM B. DINSMORE ET AL. vs. THE SOUTHERN EXPRESS COMPANY ET AL.	In Equity. Bill, etc. Application for Injunction, etc.

The above-stated cause having been duly assigned for hearing on the application for temporary injunction, at Augusta, in said district, on the 10th day of February, 1899, and the parties having been fully heard on the bill and the demurrer thereto,
41 and the court having taken time for advisement:

It is now upon consideration ordered, adjudged and decreed that the prayer that the Southern Express Company be enjoined from voluntarily paying the war-stamp tax in question be and the same is hereby denied. Ordered, adjudged and decreed further that the defendants, The Railroad Commission of Georgia, and each member thereof, to wit: the individual defendants, Leander N. Trammell, Thomas C. Crenshaw, Jr., and Spencer R. Atkinson, be and the same are hereby enjoined from any and all order, direction, action or legal steps instituting or tending to institute, and from any and all proceedings for the recovery of the penalties named in the statute of Georgia in that behalf to enforce compliance with its said order against the Southern Express Company, its officers or agents as threatened in the order of said commission, dated August 2, 1898, for the reason that said order is null and void, and said commission has no jurisdiction to adjudge and designate the party who shall pay said tax.

Ordered further that the cause proceed as usual in equity.

March 7th, 1899.

EMORY SPEER, *U. S. Judge.*

Endorsement: United States circuit court, northeastern division, southern district of Georgia. William B. Dinsmore *et al. vs.* The Southern Express Company *et al.* Order of court on application for injunction, etc. Filed March 8th, 1899, at 9 o'clock a. m. Geo. K. Calvin, deputy clerk.

Appeal and Order Allowing Same.

Circuit Court of the United States, Southern District of Georgia, Northeastern Division.

WM. B. DINSMORE ET AL., Plaintiffs, *vs.* SOUTHERN EXPRESS CO. ET AL., Defendants (L. N. Trammell, Thos. C. Crenshaw, Jr., and Spencer R. Atkinson, Railroad Commissioners of Georgia, Individually and as Such Railroad Commissioners, *et al.*, Defendants and Appellants).	In Equity.

42 The following above-named defendants, to wit, L. N. Trammell, Thomas C. Crenshaw, Jr., and Spencer R. Atkinson, composing the railroad commission of the State of Georgia, individually, and as railroad commissioners, conceiving themselves aggrieved by the decree entered on the 7th day of March, 1899, in the above cause, do hereby appeal to the U. S. circuit court of appeals for the fifth circuit, at New Orleans, Louisiana, and pray that this their appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the said U. S. circuit court of appeals for the fifth circuit, at New Orleans, Louisiana.

J. M. TERRELL,
Solicitor for Appellants.

U. S. Circuit Court for the Northeastern Division of the Southern District of Georgia.

Now, to wit, on the 18th day of March, 1899, it is ordered that the appeal may be allowed as prayed for.

EMORY SPEER, *Judge.*

Assignments of Error.

W. B. DINSMORE ET AL., Plaintiffs, *vs.* SOUTHERN EXPRESS CO. ET AL., Defendants (L. N. Trammell, Thos. C. Crenshaw, Jr., and Spencer R. Atkinson, Railroad Commissioners of Georgia, Defendants and Appellants).	In Equity.

Now comes the said L. N. Trammell, Thos. C. Crenshaw, Jr., and Spencer R. Atkinson, composing the railroad commission of Georgia, who appeal from the decree in the above-stated cause, which was entered on the 7th day of March, 1899, and, with their appeal this day allowed, file the following assignment- of error:

1st. That the court erred in not sustaining the demurrer of these defendants to the bill of the said W. R. Dinsmore *et al.* Said demurrer should have been sustained upon each and every ground therein mentioned.

2nd. That the court erred in granting the injunction against these defendants as set out in said decree.

43 3rd. That the court erred in holding the order rendered by these defendants, as railroad commissioners, on the 2nd day of August, 1898, to be null and void.

4th. That the court erred in holding under the facts and circumstances set forth in said bill that these defendants as railroad commissioners of Georgia did not have competent authority under the law for the institution and prosecution of the said threatened suits.

5th. That the court erred in holding that the said action of the said express company in compelling the consignor to pay a charge which had been imposed by the war-revenue act of 1898 upon it did not amount to an increase of the rate prescribed by the said railroad commission for express companies doing business in Georgia.

6th. That the court having under said bill taken jurisdiction in equity for the purpose of preventing the institution and prosecution of a multiplicity of suits respecting the same subject-matter erred in declining to consider, adjudicate and determine the principal matters in controversy—that is to say, whether the said express company or the consignor was liable for said tax, and whether the said express company being so liable the said railroad commission had competent authority to institute and prosecute said threatened suits; and further erred in granting the said injunction without determining said matters.

J. M. TERRELL,
Solicitor for Appellants.

P. O. address, Atlanta, Ga.

Let this assignment of errors be filed with the appeal above allowed.

This March 18th, 1899.

EMORY SPEER, *Judge.*

Endorsement: United States circuit court, northeastern division, southern district of Georgia. William B. Dinsmore *et al.*, pl'ffs, *vs.* Southern Express Company *et al.* Appeal and order allowing same. Assignment of errors and order to file same. Filed March 18, 1899. Cecil Morgan, deputy clerk.

Bond of Appellants.

Circuit Court of the United States, Southern District of Georgia, Northeastern Division.

44 WM. B. DINSMORE ET AL., Plaintiffs,
vs.
SOUTHERN EXPRESS CO. ET AL., Defendants (L. N. Trammell, Thos. C. Crenshaw, Jr., and Spencer R. Atkinson, Railroad Commissioners of Georgia, Individually and as Such Railroad Commissioners, *et al.*, Defendants and Appellants). } In Equity.

Know all men by these presents that we, L. N. Trammell, Thos. C. Crenshaw, Jr., and Spencer R. Atkinson, individually, and as railroad commissioners of Georgia, as principals, and Wm. J. Speer, as security, are held and firmly bound unto Wm. B. Dinsmore and C. Gray Dinsmore, and Wm. B. Dinsmore and C. Gray Dinsmore and Dumont Clarke, as executors of and trustees under the will of Wm. B. Dinsmore, deceased, complainants in the above-stated cause, in the just and full sum of two hundred and fifty ($250.00) dollars, for the true payment of which we bind ourselves, our heirs, executors and administrators firmly by these presents.

Signed, sealed, and delivered this 20th day of March, 1899.

The condition of the above obligation is as follows:

The said Trammell, Crenshaw and Atkinson, individually, and as railroad commissioners, having presented an appeal from the decree entered in the above-stated cause on the 7th day of March, 1899, now should the said appellants well and truly pay or cause to be paid to said complainants all cost in said cause if they should fail to sustain their appeal, then this bond to be void, else of full force and effect.

L. N. TRAMMELL. [L. S.]
THOS. C. CRENSHAW, JR. [L. S.]
W. J. SPEER. [L. S.]

Attest: J. D. MASSEY,
Notary Public, Fulton Co., Ga.

[Notarial Seal.]

Order Approving Bond.

The above and foregoing bond is hereby approved and ordered filed. This 21st day of March, 1899.

EMORY SPEER, *Judge.*

45 *Citation.*

Circuit Court of the United States, Southern District of Georgia, Northeastern Division.

WM. B. DINSMORE ET AL., Plaintiffs,
vs.
SOUTHERN EXPRESS CO. ET AL., Defendants (L. N. Trammell, Thos. C. Crenshaw, Jr., and Spencer R. Atkinson, Railroad Commissioners of Georgia, Individually and as Such Railroad Commissioners, *et al.*, Defendants and Appellants). } In Equity.

L. N. Trammell, Thos. C. Crenshaw, Jr., and Spencer R. Atkinson, individually, and as railroad commissioners of Georgia, having appealed from the decree entered on the 7th day of March, 1899, in the above-stated cause to the U. S. circuit court of appeals for the fifth circuit, and said appeal having been duly allowed, the complainants in the above-stated cause, to wit, Wm. B. Dinsmore and C. Gray Dinsmore, and Wm. B. Dinsmore, C. Gray Dinsmore and Dumont Clarke, as executors of and trustees under the will of Wm. B. Dinsmore, deceased, are required to show cause, if any there be, on the — day of ——, 1899, before the U. S. circuit court of appeals for the fifth circuit, in the city of New Orleans, why said appeal should not be sustained.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States Supreme Court, this the 21st day of March, 1899.

EMORY SPEER, *Judge.*

Acknowledgements of Service.

UNITED STATES OF AMERICA,
Southern District of Georgia, Northeastern Division.

Service of the within citation hereby acknowledged and copy waived.

WM. B. DINSMORE ET AL., *Complainants,*
By FRANK H. MILLER, *Their Solicitor.*

UNITED STATES OF AMERICA,
Southern District of Georgia, Northeastern Division.

46 WM. B. DINSMORE ET AL., Plaintiffs,
vs.
SOUTHERN EXPRESS COMPANY ET AL., Defendants (L. N. Trammell, Thos. C. Crenshaw, Jr., and Spencer R. Atkinson, Railroad Commissioners of Georgia, Individually and as Such Railroad Commissioners, *et al.*, Defendants and Appellants). } Original Citation on Appeal to the U. S. C. Appeals, Fifth Circuit.

Service is hereby acknowledged of a copy of the citation in the above-stated case for and in behalf of the defendants, L. N. Tram-

mell, Thos. C. Crenshaw, Jr., and Spencer R. Atkinson, railroad commissioners of Georgia, individually, and as such railroad commissioners.

March 29, 1899.

F. G. DU BIGNON,
Att'y for Southern Exp. Co.

Endorsement: U. S. circuit court, N. E. division, southern district of Ga. William B. Dinsmore *et al. vs.* The Southern Express Company *et al.* Bond, $250, on appeal, order approving same, and citation. Acknowledgments of service. Filed in office this 22nd day of March, 1899, at 9 o'clock a. m. Geo. K. Calvin, deputy clerk.

Cross-appeal.

In the Circuit Court of the United States for the Northeastern Division of the Southern District of Georgia.

WILLIAM B. DINSMORE ET AL.
vs.
THE SOUTHERN EXPRESS COMPANY ET AL. } In Equity.

And now come the complainants, William B. Dinsmore and C. Gray Dinsmore, and the said William B. Dinsmore, C. Gray Dinsmore, and Dumont Clarke, as executors of and trustees under the will of William B. Dinsmore, deceased, and, conceiving themselves aggrieved by the decree made by said court on the 7th day of March, 1899, in the cause of these complainants against the Southern
47 Express Company, Leander N. Trammell, Thomas C. Crenshaw, Jr., and Spencer R. Atkinson, individually, and as railroad commissioners of the State of Georgia, and Joseph M. Terrell, individually, and as attorney general of the State of Georgia—in refusing an injunction against the Southern Express Company as prayed for in the bill; inasmuch as an appeal has been allowed by the said court March 18th, 1899, from said decree upon the application of the defendants, Leander M. Trammell, Thomas C. Crenshaw, Jr., and Spencer R. Atkinson, individually and as railroad commissioners of the State of Georgia, the said complainants do hereby appeal from the said decree as against them, to the circuit court of appeals for the fifth circuit, and they respectfully pray that this their cross-appeal may be allowed by this honorable court, and that a transcript of the record and proceedings and papers upon which said decree was made may be duly authenticated and sent to the said United States circuit court of appeals for the fifth circuit aforesaid. And they also tender herewith a bond conditioned for the payment of the costs of appeal required by law, in the penal sum of two hundred and fifty dollars, and pray the court approve the said bond and allow this their appeal.

FRANK H. MILLER,
Solicitor for Complainants.

SOUTHERN DISTRICT OF GEORGIA, }
Northeastern Division. }

Now, to wit, on the 28th day of March, 1899, it is ordered that the cross-appeal be allowed as prayed for.

EMORY SPEER, *U. S. Judge.*

Assignment of Errors.

In the Circuit Court of the United States for the Northeastern Division of the Southern District of Georgia.

WILLIAM B. DINSMORE ET AL.
vs.
THE SOUTHERN EXPRESS CO. ET AL. } In Equity.

Filed October 27, 1898.

Now on this the 28th day of March, 1899, come the complainants by Frank H. Miller, their solicitor, and present to the court at the time of the allowance of their cross-appeal assignments of errors, and say that in the record and proceedings in the above-entitled cause there is manifest error, in this to wit:

48 1. That the court erred in denying any injunction against the Southern Express Company as prayed for.

2. That the court erred in refusing to enjoin the Southern Express Company from voluntarily complying with the order of the railroad commission of August 2nd, 1898, set out in the complainants' bill.

3. That the court erred in refusing to enjoin the Southern Express Company from paying the war revenue tax imposed under the act of Congress approved June 13, 1898, entitled, An act to provide ways and means to meet war expenditures, and for other purposes, namely, a stamp of the value of one cent to each bill of lading, manifest, or memoranda, and to each duplicate thereof, which the railroad commission, on August 2nd, 1898, ordered the express company to pay and they continued to pay because of such order.

Wherefore and for divers other causes appearing on the face of said record, the said appellees pray that their cross-appeal be sustained and the cause remanded to the circuit court of the United States for the northeastern division of the southern district of Georgia, and that further proceedings be had in accordance with the mandate of the United States circuit court of appeals.

FRANK H. MILLER,
Sol'r for Complainants (now Appellants).

Let this assignment of errors be filed with the cross-appeal above allowed. EMORY SPEER, *U. S. Judge.*

Endorsement: United States circuit court of appeals for the fifth circuit. Wm. B. Dinsmore *et al.*, appellants, *vs.* L. N. Trammell *et al.*, individually and as the railroad commissioners of the State of Georgia, & The Southern Express Co., appellees. Original cross-

appeal and assignments of error by Wm. B. Dinsmore *et al.* Filed this 29th day of March, 1899. Geo. K. Calvin, deputy clerk.

Costs Bond of Wm. B. Dinsmore et al.

The Circuit Court of the United States for the Northeastern Division of the Southern District of Georgia.

49 WILLIAM B. DINSMORE ET AL.
vs.
THE SOUTHERN EXPRESS COMPANY ET AL. } In Equity. Bill, &c.

Know all men by these presents, that we, William B. Dinsmore and C. Gray Dinsmore, in proper *that we, William B. Dinsmore and C. Gray Dinsmore, in proper* person, and the said William B. Dinsmore, C. Gray Dinsmore, and Dumont Clarke, as executors of and trustees under the will of William B. Dinsmore, deceased, as principals, and Linwood C. Hayne, as surety, are held and firmly bound unto Leander N. Trammell, Thomas C. Crenshaw, Jr., and Spencer R. Atkinson, individually and as railroad commissioners of the State of Georgia, and Joseph M. Terrell, individually and as the attorney general of the State of Georgia, in the sum of two hundred & fifty dollars, for the payment of which well and truly to be made, we bind ourselves and each of us, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this twenty-seventh day of March, 1899.

Whereas the above-named William B. Dinsmore and C. Gray Dinsmore, in proper person, and the said William B. Dinsmore, C. Gray Dinsmore, and Dumont Clarke, as executors of and trustees under the will of William B. Dinsmore, deceased, have presented a cross-appeal, to the United States circuit court of appeals for the fifth circuit, to reverse the decree rendered in the above-entitled cause, which was made and entered in the said circuit court of the United States for the northeastern division of the southern district of Georgia on the seventh day of March, 1899.

Now, therefore, the condition of this obligation is such that if the above-named William B. Dinsmore and C. Gray Dinsmore, in proper person, and the said William B. Dinsmore, C. Gray Dinsmore, and Dumont Clarke, as executors and trustees as aforesaid, shall prosecute said cross appeal to effect and answer all costs if they shall fail to sustain said appeal, then this obligation shall be void, otherwise to remain in full force and virtue.

WILLIAM B. DINSMORE,
C. GRAY DINSMORE,
WILLIAM B. DINSMORE,
C. GRAY DINSMORE, &
DUMONT CLARKE,
Executors of William B. Dinsmore,
WILLIAM B. DINSMORE,
By FRANK H. MILLER,
Their Solicitor.
LINWOOD C. HAYNE. [SEAL.]

50 Signed, sealed and acknowledged before me—

FRANK G. FORD,

[NOTARIAL SEAL.] *Not. Public, Richmond Co., Ga.*

UNITED STATES OF AMERICA,
Southern District of Georgia, Northeastern Division.

Linwood C. Hayne being duly sworn says he is surety on the foregoing bond and is worth the penalty thereof over and above his just debts, liabilities and homestead exemption of this State.

LINWOOD C. HAYNE.

Sworn to and subscribed before me this March 27th, 1899.

FRANK G. FORD,

[NOTARIAL SEAL.] *Not. Public, Richmond Co., Ga.*

The above and foregoing bond is hereby approved and ordered filed, this March 28, 1899.

EMORY SPEER, *U. S. Judge.*

Endorsement: United States circuit court of appeals for the fifth circuit. Wm. B Dinsmore *et al.*, appellants, *vs.* L. N. Trammell *et al.*, individually and as the railroad commissioners of the State of Georgia, and The Southern Express Company, appellees. Costs bond of Wm. B. Dinsmore *et al.* Filed this 29th day of March, 1899. Geo. K. Calvin, deputy clerk.

Citation in Aid of Cross-appeal.

UNITED STATES OF AMERICA,
Southern District of Georgia, Northeastern Division.

To Leander N. Trammell, Thomas C. Crenshaw, Jr., and Spencer R. Atkinson, individually and as the railroad commissioners of the State of Georgia, and Joseph M. Terrell, individually and as the attorney general of the State of Georgia, and to the Southern Express Company:

51 You and each of you are hereby cited and admonished to be and appear at the United States circuit court of appeals for the fifth circuit to be holden at New Orleans in the State of Louisiana, on the seventh day of April, 1899, pursuant to a cross-appeal allowed in open court and filed this day in the clerk's office of the United States circuit court for the southern district of Georgia, northeastern division, wherein William B. Dinsmore and C. Gray Dinsmore, in proper person, and William B. Dinsmore, C. Gray Dinsmore, and Dumont Clarke, as executors of and trustees under the will of William B. Dinsmore, deceased, are appellants, and you the above-named parties to whom this citation is directed, are respondents, to show cause why the decree in the said cross-appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 28th day of March, 1899.

EMORY SPEER, *U. S. Judge.*

Acknowledgments of Service.

UNITED STATES OF AMERICA,
Southern District of Georgia, Northeastern Division.

WM. B. DINSMORE ET AL.
vs.
SOUTHERN EXPRESS CO. ET AL.

Citation on cross-appeal to the United States C. C. appeals, fifth circuit.

Service is hereby acknowledged of a copy of the citation in the above-stated case for and in behalf of the Southern Express Company.

March 29th, 1899.

F. G. DU BIGNON,
Att'y for Southern Exp. Co.

UNITED STATES OF AMERICA,
Southern District of Georgia, Northeastern Division.

52 WILLIAM B. DINSMORE ET AL.
vs.
THE SOUTHERN EXPRESS CO. ET AL.

In equity. Cross-appeal to the U. S. C. C. appeals, fifth circuit.

Service is hereby acknowledged for and in behalf of Leander N. Trammell, Thomas C. Crenshaw, Jr., and Spencer R. Atkinson, individually and as railroad commissioners of the State of Georgia, and Joseph M. Terrell, individually, and as attorney general of the State of Georgia, of a copy of the citation in the above stated case sued out by William B. Dinsmore, *et al.*, original complainants, in aid of the cross-appeal taken by them from the decree of the court of March 7th, 1899.

This March 30th, 1899.

J. M. TERRELL,
Solc. for Respondents Named Herein.

Endorsement: United States circuit court of appeals for the fifth circuit. Wm. B. Dinsmore *et al.*, appellants, *vs.* L. N. Trammell *et al.*, individually and as the railroad commissioners of the State of Georgia, & The Southern Express Company, appellees. Citation in aid of cross-appeal of Wm. B. Dinsmore *et al.* Filed this 29th day of March, 1899. Geo. K. Calvin, deputy clerk.

Stipulation as to Record.

UNITED STATES OF AMERICA,
Southern District of Georgia, Northeastern Division.

WILLIAM B. DINSMORE ET AL.
vs.
SOUTHERN EXPRESS CO. ET AL.

In equity. Cross-appeal to U. S. circuit court of appeals for the fifth circuit.

It is hereby stipulated and agreed by and between the counsel for the respective parties as follows:

1. That the clerk of the circuit court of the U. S. for the northeastern division of the southern district of Georgia, shall make out and send forward but one transcript of the record. That the same shall be received and filed in the circuit court of appeals as
53 a compliance with the law and rules of the court as to both the original appeal of the railroad commission and the cross-appeal of the original complainants, the same to be used on the hearing for each and every purpose, as if separate and independent transcripts of the record had been certified and sent forward in aid of each appeal.

FRANK H. MILLER,
Sol'r for W. B. Dinsmore et al.
J. M. TERRELL,
Solc. for Railroad Commission and Att'y Gen'l.

United States circuit court of appeals. William B. Dinsmore *et al.*, appellants, *vs.* The Railroad Commissioners of Georgia.

Endorsement: United States circuit court of appeals. William B. Dinsmore *et al.*, appellants, *vs.* The Railroad Commissioners of Georgia and The Southern Express Company, appellees. Original stipulation between counsel that one record shall answer for the original & cross appeal. Filed in office March 31, 1899. Geo. K. Calvin, deputy clerk.

Order to Include Portion of Brief of Complainants' Solicitor in the Record.

In the Circuit Court of the United States for the Northeastern Division of the Southern District of Georgia.

WILLIAM B. DINSMORE ET AL.
vs.
SOUTHERN EXPRESS COMPANY ET AL. } In Equity. Bill, etc.

It is ordered by the court that for the correct understanding of its decision hereinbefore filed and from which the appeal is taken, that the clerk certify and send up with the record to the circuit

court of appeals that portion of the brief of Frank H. Miller, of counsel for complainant and solicitor of record, presented to the court on the hearing of this case, as follows:

The Revenue Act.

"If the construction of this law is involved in this case, against the commissioners, and we submit that it is not as the commission has no power to administer it, our contention being that the act
54 of the commission, in directing and requiring the Southern Express Company to pay the stamp tax imposed by the Federal Government was illegal, and the commission exceeded its lawful power—which *are* only to prescribe rates. It has only State authority, and cannot arrogate to itself to provide how and by whom the revenue taxes of the General Government be paid—still, if in the opinion of the court the construction of the law is involved, then we submit the following as the correct view of the statute."

It being true that upon this submission of complainants' counsel and solicitor aforesaid, the court held that the complainants did not ask a construction of the revenue act in question.

This April 6th, 1899.

EMORY SPEER, *U. S. Judge.*

Endorsement: U. S. circuit court, N. E. division, southern district of Ga. William B. Dinsmore *et al. vs.* The Southern Express Company *et al.* Order to include portion of brief of complainants' solicitor in the record. Filed this 7th day of April, 1899. Geo. K. Calvin, deputy clerk.

Certified Copy of Extract from Brief of Complainants' Solicitor.

In conformity to the provisions of the foregoing order of court the following extract from the brief of Frank H. Miller, of counsel for complainants and solicitor of record, presented to the court on the hearing of this case, is now set out in the record as follows:

The Revenue Act.

"If the construction of this law is involved in this case against the commissioners, and we submit that it is not as the commission has no power to administer it, our contention being that the act of the commission, in directing and requiring the Southern Express Company to pay the stamp tax imposed by the Federal Government was illegal, and the commission exceeded its lawful power, which is only to prescribe rates, it has only State authority, and cannot arrogate to itself to provide how and by whom the revenue taxes of the General Government be paid, still, if in the opinion of the court the construction of the law is involved, then we submit the following as the correct view of the Federal statute."

55 I, H. H. King, clerk of the circuit court of the United States for the southern district of Georgia, do hereby certify that the above extract from the brief of Frank H. Miller, of counsel

and solicitor of record, is a true copy of that portion of the original brief presented to the court on the hearing of the case. Witness my official hand and the seal of said court, this 7th, day of April. A. D., 1899.

[SEAL.] H. H. KING, *Clerk.*

Order Extending Time for Clerk to Make Out and Transmit the Record.

UNITED STATES OF AMERICA,
Southern District of Georgia, Northeastern Division.

WILLIAM B. DINSMORE ET AL.
vs.
THE SOUTHERN EXPRESS CO. ET AL. } In Equity.

It appearing to the court that Leander N. Trammell, Thomas C. Crenshaw, Jr., and Spencer R. Atkinson, individually, and as railroad commissioners of the State of Georgia, sued out an appeal in open court March 18th, 1899, to the decree of the court of March 7th, 1899; and that William B. Dinsmore and the other complainants sued out a cross-appeal in open court March 28th, 1899, to the said decree of the court of March 7th, 1899, which appeals were each of them perfected and citations having issued in aid of each appeal which have been duly and legally served upon all the parties to the record; and it appearing that owing to engagements of the clerk since the suing out of the appeals, his indisposition, and for other satisfactory cause, he has been unable to copy the record in the cause and transmit the transcript to the United States circuit court of appeals by the return days named in the citations.

It is now, on motion, in behalf of the said clark, and with the consent of the parties to the record, ordered that the time be enlarged and extended to 1st day May within which to make out and transmit the record. That this order be entered on the minutes of the court and copied in the transcript, and the original transmitted to the United States circuit court of appeals for the fifth circuit.

In open court, April 6, 1899.

EMORY SPEER,
U. S. Judge Who Signed the Citations upon Allowance of Appeal & Cross-appeal.

Endorsement: U. S. circuit court, N. E. division, southern district of Ga. Wm. B. Dinsmore *et al. vs.* The Southern Express Company *et al.* Order extending time for clerk to make out and transmit the record, &c. Filed this 7th day of April, 1899. Geo. K. Calvin, deputy clerk.

Clerk's Certificate.

I, H. H. King, clerk of the circuit court of the United States, for the southern district of Georgia, do hereby certify that the foregoing pages, numbered from page 1 to page 73, inclusive, hereto annexed, contain a true, correct and complete transcript of the record and

proceedings had in said court in the cause wherein William B. Dinsmore, *et al.*, are complainants, and The Southern Express Company, L. N. Trammell, *et al.*, railroad commissioners of the State of Georgia, are defendants, in equity, as the same remain on file and of record in my office.

In witness whereof I have hereunto set my hand and affixed the seal of my office, at Savannah, Georgia, this 13th day of April, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States of America the one hundred and twenty-second.

[SEAL.] H. H. KING,
Clerk United States Circuit Court for the Southern District of Georgia.

57 (*Extract from Minutes.*)

United States Circuit Court of Appeals, Fifth Circuit, November Term, 1898.

TUESDAY, *May 9th*, 1899.

L. N. TRAMMELL ET AL.
vs.
WILLIAM B. DINSMORE ET AL.

WILLIAM B. DINSMORE ET AL.
vs.
SOUTHERN EXPRESS COMPANY, L. N. TRAMMELL, ET AL.

No. 820.

This cause was regularly called this day, and on agreement of counsel present was continued.

Application for Reassignment.

United States Circuit Court of Appeals, Fifth Circuit.

L. N. TRAMMELL ET AL., Railroad Commissioners of the State of Georgia, Appellants,
vs.
WILLIAM B. DINSMORE ET AL., Appellees.

WILLIAM B. DINSMORE ET AL., Cross-appellants,
vs.
SOUTHERN EXPRESS COMPANY, L. N. TRAMMELL, ET AL., Railroad Commissioners of the State of Georgia, Cross-appellees.

No. 820.

Appeal and cross-appeal from the U. S. circuit court, southern district of Georgia.

To the circuit court of appeals of the United States for the fifth circuit:

The undersigned, of counsel for the parties to the record in the above-stated case, respectfully recall to the attention of the court

that this cause, when called in its order May 9, 1899, was continued by unanimous request for the term, it being made known to the court that there was then pending in the Supreme Court of the United States a case which had been advanced under the
58 rules of that court, set for hearing October 16th, 1899, namely, *Crawford vs.* Hubbell, treasurer of the Adams Express Company, presenting issues which required a construction of the act of Congress under which the tax upon express receipts was assessed and imposed. The hearing of this case in the Supreme Court of the United States was *was* deferred to await a full bench, and was argued November 8th, 1899. No decision has yet been rendered, and as counsel are advised that the above-stated case is set down for hearing in this honorable court Wednesday, December 20th, 1899, counsel respectfully request at the hands of this court a reassignment of the above-stated case from December 20th, 1899, to such other day as will suit the pleasure of the court, allowing a sufficient interval to elapse for the Supreme Court of the United States to render its decision and for counsel to obtain a certified copy thereof.

Respectfully submitted.

J. M. TERRELL,
Sol'r for L. N. Trammell et al., Railroad Commissioners.
FRANK H. MILLER,
Solicitor for W. B. Dinsmore et al.
F. G. DU BIGNON,
Solicitor for Southern Express Company.

Endorsed: Application for reassignment of case. Filed December 15, 1899. J. M. McKee, clerk.

(*Extract from Minutes.*)

November Term, 1899.

WEDNESDAY, *December* 20, 1899.

L. N. TRAMMEL ET AL. *v.* and *adv.* WM. B. DINSMORE ET AL. } No. 820.

This cause was regularly called this day, and upon considering the motion of counsel filed herein, it is ordered that this cause be, and the same is hereby, continued.

58½ November Term, 1899.

WEDNESDAY, *May* 16, 1900.

(*Extract from Minutes.*)

L. N. TRAMMELL ET AL.
vs.
W. B. DINSMORE ET AL.

W. B. DINSMORE ET AL.
vs.
SOUTHERN EXPRESS COMPANY ET AL.

No. 820.

This cause was regularly called this day and submitted to the court after argument by Mr. J. M. Terrell, for the Railroad Commission of the State of Georgia, and by Mr. W. K. Miller, for W. B. Dinsmore *et als.*

59 November Term, 1899.

JUNE 1ST, 1900.

(*Extract from Minutes.*)

L. N. TRAMMELL ET AL., Railroad Commissioners of the State of Georgia,
vs.
WILLIAM B. DINSMORE ET AL.

WILLIAM B. DINSMORE ET AL.
vs.
SOUTHERN EXPRESS COMPANY ET AL.

No. 820.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the southern district of Georgia and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, reversed, and that the suit be, and is hereby, dismissed at the costs of the complainants.

A true copy.
Attest:

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

J. M. McKEE,
Clerk United States Circuit Court of Appeals for the Fifth Circuit.

60 United States Circuit Court of Appeals, Fifth Circuit, November Term, 1899.

Filed June 7th, 1900.

L. N. TRAMMELL ET AL., Railroad Commissioners of the State of Georgia, Appellants,
vs.
WILLIAM B. DINSMORE ET AL., Appellees.

WILLIAM B. DINSMORE ET AL., Cross-appellants,
vs.
THE SOUTHERN EXPRESS COMPANY, L. N. TRAMMELL, *et al.*, Railroad Commissioners of the State of Georgia, Cross-appellees.

No. 820.

Appeal and cross-appeal from the circuit court of the United — for the southern district of Georgia.

Before Pardee, McCormick, and Shelby, circuit judges.

The complainants, who are citizens of the State of New York, are shareholders in the Southern Express Company, a Georgia corporation, which has its principal office in the State of Georgia and conducts the business of an express carrier in that State and in ten of the neighboring States. The charging part of the bill in this suit avers substantially that the constitution of the State of Georgia, adopted December 21, 1877, expressly charges the legislature of that State with the duty to pass laws from time to time to regulate freight and passenger tariffs to prevent unjust discrimination on the various railroads of the State and to prohibit the same from charging other than just and reasonable rates and to enforce the same by adequate penalties; that, acting under this constitutional provision, the General Assembly of the State of Georgia passed an act on October 14, 1879, to carry the same into effect, the
61 *the* provisions of which act have been enlarged from time to time, and by an act approved October 21, 1891, the powers of the railroad commissioners were extended so as to give them authority to regulate charges for express companies for transportation from one point to another in the State of Georgia; that pursuant to this authority the railroad commissioners fixed and prescribed rules, tariffs, and classifications governing express companies plying between points within the State of Georgia and published and distributed their report of same, to which the bill refers; that from the date of the adoption of these measures the Southern Express Company conformed to the rules, orders, and tariffs so adopted by the railroad commission of Georgia, and were continuing to do so up to June 13, 1898, when the Congress of the United States passed the act commonly designated as the war-revenue act, by which it was made the duty of express companies on receiving a package for carriage to issue a receipt for such package, and providing that the receipt thus issued should bear a 1-cent stamp; that upon the taking effect of the war-revenue act, July 1, 1898, the Southern Express

Company asked and demanded the production by its customers of the stamp required to be attached under the provisions of the act at the issuing of its receipts or bills of lading, insisting that it should not carry any package or issue its receipt therefor until the sender or shipper furnished the necessary governmental stamp therefor; that certain citizens of Georgia refused to furnish these stamps or to pay for the same if furnished by the express company, and thereupon complained to the railroad commission of the State of Georgia, to wit, the respondents Leander N. Trammell, Thomas C. Crenshaw, and Spencer R. Atkinson, who, as such commission, on July 11, 1898, issued an order as follows:

"It being represented to the railroad commission of Georgia that the Southern Express Company, a corporation engaged as an express company in this State in the business of a common carrier of goods and merchandise for hire, since the passage by the Federal Congress of an act, approved June 13, 1898, entitled 'An act to provide ways and means to meet war expenditures, and for other purposes,' has exacted and continues to exact from shippers, as a condition precedent to forwarding any goods tendered to it for transportation between points within this State, the payment of a special tax upon such shipments imposed by said act, thus indirectly increasing the cost of transportation beyond the rate fixed therefor by this commission, it is

"Ordered that the Southern Express Company do appear
62 before this commission on the 18th day of July, 1898, then and there to show cause, if any it can, why it should not be held to have violated the rules and regulations of this commission by the exactions or overcharges, as aforesaid, and why suit should not be instituted against it in every case of such overcharges for the recovery of the penalty provided by law for such illegal act."

That the express company, in obedience to this order, appeared before the commission, and "cause was shown, respectfully denying all jurisdiction in the premises on the part of said commission, who on August 2, 1898, ordered and directed said stamp tax to be furnished, attached, cancelled, and paid by the Southern Express Company alone, and not by the shippers in whole or in part;" that on August 8th, 1898, the complainants duly requested the Southern Express Company and its directors and each of them in writing to omit and refuse to pay and to refrain from paying the said tax, and to test the constitutionality of the said action, and to refrain from voluntarily placing stamps upon its said receipts and cancelling the same before delivery, and to apply to a court of competent jurisdiction to determine the liability of the company under the said act, in the mode and manner as required by the said railroad commission; that on the same day (August 8, 1898) the board of directors replied to this request, stating that they deemed it inexpedient to comply with it on the ground that the failure to comply with the requirements of the order of the Georgia railroad commissioners of August 2, 1898, would subject the company to litigation with the authorities of the State of Georgia and the said railway commission, and the company would thereby run the risk of incurring penalties

under the laws of Georgia and of so clouding the title to its corporate franchise and rights as to embarrass its action.

It replied, further, that the company "will notify the railroad commission of Georgia that while respectfully protesting against the legality and validity of its order of August 2, 1898, the company will abide by and perform the same, and also that the company will file its application to said commission to be allowed to collect
63 from the shipper, in addition to the existing rates sanctioned by the commission, the amount of war-revenue tax held by the commission to be payable by the company, and in aid thereof will present to the commission a renewed request for the suspension of the order of August 2, 1898, until decision has been rendered on such application." On August 29, 1898, the board of directors notified the complainants that the railroad commission of Georgia had denied the application of the company to be allowed to collect from the shipper, in addition to the existing rates sanctioned by the commission, the amount of the war-revenue tax held by the commission to be payable by the company, and that the company was then observing the Georgia railroad commission's rates on intrastate business in Georgia, and was as to such business paying the amount of the war-revenue tax without charging the same to the shipper or endeavoring to collect the same from the shipper. Thereafter (October 27, 1898) the bill in this suit was filed, from which we make the following literal excerpts:

"And the complainants aver that there is no reason to believe that there can be and will be an increase of complainant's local and intrastate business; that the cost of conducting said business has been fixed by years of experience, and the amounts now paid therefor are the lowest that can be obtained and adopted and by which the public can be satisfactorily served by said express company; that the charges fixed by the said commissioners before the passage of the said revenue law were established so as to enable the company to live, operate, and pay a fair dividend or return to its owners for the money and property embarked in the said business, and that the order of the said commissioners requiring the payment by the said company of the said one-cent stamp on all bills of lading and receipts that it issued for the business done was resolved upon by the said commissioners illegally and arbitrarily and will cause a large reduction in the income of the company; that the enforcement of this order will be unfair, unjust, and unreasonable; that the rates of carriage now imposed require the said express company to carry many classes of freight at barely cost, and the expense incident to said service will in future be materially increased by the stamp aforesaid; that the payments for said stamps thus required to be made as a part of the rates imposed on the express company and under which it must do business by the order of said commission will result in irreparable damage and injury and will cause a diminution of income, as nearly as can be ascertained, of forty thousand dollars ($40,000) per annum and a loss to complainants in a decreased value of their shares of ten thousand dollars or other large sum.

* * * * * * *

"Your orators further shows that the said Southern Express Company and its directors, having declared their intention to do so, will now pay the said revenue tax out of the income and profits of the company and will thereby diminish the assets of the company and lessen the dividends thereon and the value of its shares, and will also pay the tax to the State on its gross income without any deductions therefrom of the revenue tax so imposed; that the voluntary compliance with the provisions of the said order of the railroad commission will expose the express company to a multiplicity of suits by and on behalf of its numerous shareholders, which will work irreparable injury to the business of the company and involve it in great and irreparable damage to your orators and of all the other shareholders.

64

* * * * * * *

"Your orators pray—

1. That it may be adjudged and decreed that the order of the railroad commission of the State of Georgia of August 2, 1898, requiring the Southern Express Company to pay the amount of the war revenue tax on business from one point to another in the State of Georgia without endeavoring to collect the same from the shippers or requiring them to make the payment thereof before the issuing of the said receipts or bills of lading *to* be without jurisdiction on the part of the said commission, unconstitutional, null, and void.

2. That the Southern Express Company, its officers and agents, be restrained from voluntarily complying with the provisions of the said order of the said railroad commission of August 2, 1898, and paying the said war revenue tax, as aforesaid.

3. That the attorney general of the State of Georgia be restrained from instituting any suit of any sort against the Southern Express Company for the purpose of enforcing the provisions of the said order of the said railroad commission of August 2, 1898.

4. That a writ of provisional and perpetual injunction of the same purport, tenor, and effect as hereinbefore set forth be granted to complainants.

5. That your orators may have such other and further relief in the premises as the nature of the case shall require and to a court of equity may seem meet."

The respondents submitted a general demurrer to the bill, assigning for cause thereof that it appeared by the bill and amendment that the complainants were not entitled to the relief prayed for, and that there was no equity in the bill and amendment, and for special cause of demurrer (besides others not necessary to state) showed that the court had no jurisdiction of the matters set forth in the complainants' bill to grant relief in the premises, "(*b*) because the acts complained of against these defendants, as set forth in said bill, are clearly within the jurisdiction and discretion of the railroad commission of Georgia under the constitution and laws of said State, and the courts have no jurisdiction to control said commission in such matters nor to restrain by injunction the exercise of such discretion, it not appearing from the allegations in said bill that there was any denial of the constitutional rights of complainants or of the

Southern Express Company or *of* any gross abuse of discretion; (c) because the power to prescribe just and reasonable rates is legislative and not judicial, and therefore the courts have no jurisdiction to inquire whether such power were well and properly exercised by the said commission; especially is this true on presentation of the facts as set out in complainants' bill."

65 The record shows that certain extracts from the 26th Annual Report of the Railroad Commission of Georgia for 1898, to which the bill had referred, were offered in evidence by the railroad commissioners and admitted, the extracts being tariff A, tariff B, tariff E, and rules from one to eleven, inclusive, applicable thereto. From the supplemental brief submitted in this court by counsel for the complainants (appellees and cross-appellants here) it appears that on the hearing in the circuit court "the commission stood upon its demurrer with its evidences of rates taken from their annual report to the executive of the State." From the original brief submitted by counsel for Dinsmore and others, the complainants, we learn—

"The order complained of is as follows:

"Office of the railroad commission of Georgia.

"ATLANTA, GA., *August* 2, 1898.

"*In re* complaint against the Southern Express Company for overcharge in demanding that shippers furnish revenue stamps to affix to bills of lading or receipts.

"On motion of Commissioner Crenshaw, it is ordered—

"That the report and opinion this day filed by Commissioner Atkinson, to whom the above-entitled matter was referred, be, and the same is hereby, adopted as the opinion and judgment of this commission.

"And it is further ordered that unless within five days from this date this commission is advised by the Southern Express Company that it has discontinued the practice of exacting from shippers the duty of furnishing the requisite revenue stamps to be attached to bills of lading or receipts as a condition precedent to receiving and forwarding goods tendered for shipment, that this commission will take such legal steps as may be necessary to enforce compliance with its rules and regulations.

"By order of the board:

"L. M. TRAMMELL, *Chairman.*

"J. D. MASSEY, *Secretary.*"

The foregoing order and the report and opinion of Commissioner Atkinson therein referred to are attached to the brief submitted by counsel for the railroad commission of Georgia. In that re-

66 port and opinion two questions are considered: (1) Does the act of the Federal Congress in question impose upon the express company the duty of furnishing the requisite revenue stamp to be affixed to the bill of lading required in the case of each consign-

ment to be issued by the carrier? (2) If so, is the refusal to accept and forward such goods except upon the condition that the shipper shall bear the burden of the carrying to the extent of providing such stamp in addition to the payment of the regular rate prescribed by this commission for the transportation of such goods a violation of the law which prohibits carriers from exacting a rate of transportation in excess of the maximum rate so prescribed?

The result of the consideration of the first question is thus expressed in the report: "The better conclusion is that when the Congress required carriers to issue a bill of lading to every shipper its purpose was to require the issue of such evidence of contract of affreightment as would enable the shipper to enforce the duty of carriers, and since affixing the stamp was necessary to the completion of such a bill of lading, the duty was by necessary implication imposed upon the carrier of furnishing and cancelling it."

In answer to the second question, namely, whether or not the exaction of the cost of a revenue stamp from a shipper amounts to a violation of the law which prohibits carriers from exacting a rate of transportation in excess of the maximum rate prescribed, and hence an extortion within the meaning of that term as employed in section 2187 of the Civil Code of Georgia, which provides: "If any railroad corporation organized or doing business in this State under any act of incorporation or general law of this State now in force, or which may hereafter be enacted, or any railroad corporation organized or which may hereafter be organized under the laws of any other State, and doing business in this State, shall charge, collect, demand or receive more than a fair and reasonable rate of toll or compensation for the transportation of passengers or freight of any description, or for the use and transportation of any railroad car upon its track, or any of its branches thereof, or upon
67 any railroad within this State which it has the right, license or permission to use, operate or control the same shall be guilty of extortion, and upon conviction thereof, shall be dealt with as hereinafter provided," the conclusion is reached that the Southern Express Company, "in refusing to accept for shipment goods tendered to it without the prepayment by the shipper of the revenue tax required by it to be affixed to its bill of lading, violates the provisions of the act hereinbefore referred to, and incurs the penalties which are therein prescribed."

The first prayer of the bill was granted, and a provisional injunction against the railroad commission was also granted. The second and third prayers were refused.

McCormick, circuit judge, after stating the case as above, delivered the opinion of the court:

Subject to the limitation that the carriage cannot be required without reward or upon conditions amounting to the taking of property for public use without just compensation, a State has power to prescribe the charges of public carriers for the carriage of persons and merchandise within its limits. The acts of the legislature of Georgia constituting the railroad commission and prescribing its

powers and duties do not violate the provisions of the Georgia constitution.

And the provisions of that constitution and of the statutes passed in pursuance thereof, administered subject to the limitation that the carriage cannot be required without reward, do not violate the Constitution of the United States and have full force as public law. Georgia Railroad Commission *v.* Smith, 70 Georgia, 694 (affirmed by the Supreme Court of the United States), 128 U. S., 174; Railroad Commission Cases, 116 U. S., 307–331; Reagan *v.* Farmers' Loan & Trust Company, 154 U. S., 362; Turnpike Company *v.* Sandford, 164 U. S., 578–598; Smith *v.* Ames, 169 U. S., 466–550; H. & T. C. Railroad *v.* Reagan, 90 Fed. Rep., 683.

The Southern Express Company, as to its business conducted between points within the State of Georgia, is bound to receive for carriage and to carry express matter properly tendered to it by any person for transportation, provided the person so tendering
68 such goods offers to pay its charges not to exceed the maximum rates fixed by the railroad commission so long as the body of the rates or the system of maximum charges prescribed by the commission are not unjust and unreasonable and such as to work a practical destruction to the rights of property of the shareholders in the corporation thus acting as a common carrier. The formation of a tariff of charges for the transportation by a common carrier of persons or property is a legislative or administrative rather than a judicial function. The courts are not authorized to revise or change the body of rates imposed by the commission. They do not determine whether one rate is preferable to another or what under all the circumstances would be fair and reasonable as between the carriers and the shippers. They do not engage in any mere administrative work. There can be no doubt of their power and duty to inquire whether a body of rates prescribed is unjust and unreasonable and such as to work a practical destruction to rights of property, and if found so to be to restrain its operation. Reagan *v.* Farmers' Loan & Trust Co., *supra*, p. 397. "While rates for the transportation of persons and property within the limits of a State are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and therefore without due process of law, cannot be so conclusively determined by the legislature of the State or by regulations adopted under its authority that the matter cannot be the subject of judicial inquiry." Smith *v.* Ames, 169 U. S., 526.

It seems clear to us from the statement of the case which we have digested from the record that the issue between the railroad commission of Georgia and the Southern Express Company was: Had that company the right to add to the maximum charges prescribed by the commission the cost of the one-cent. revenue stamp required by the act of Congress to be attached to a receipt issued in each case of shipment. As the act of Congress in question does not purport to fix or affect the rates which carriers may charge for transportation, its construction is not necessarily

involved in the solution of this issue. In the circuit court
69 counsel for the complainants submitted that the construction of the revenue act is not involved in this case, and the judge of that court who passed the decree from which this appeal is taken so held, and in the opinion which he delivered said: The issues presented by the pleadings do not render necessary a construction by the court of the act of Congress imposing the war stamp tax nor any clause of it. The shippers who refused to furnish the stamp or pay the cost of it did so on the ground that the demand thereof was an unlawful increase of the maximum rates prescribed by the commission. On this ground the complaint was made to the commission, and in its notice to the carrier the express company's action is referred to as "thus indirectly increasing the cost of transportation beyond the rate fixed therefor by the commission." When the carriers appeared before the commission in obedience to the notice it showed cause, etc., respectfully, as the bill avers, by "denying all jurisdiction in the premises on the part of the said commissioners." From which it is evident that the carrier relied on the act of Congress to support its action. Thus challenged, the commission proceeded to discuss and construe the act, and in effect held that it did not affect their power and duty to enforce the observance of the rates which they had prescribed. And later when the carrier, still protesting, applied for leave to increase its rates, the commission refused the leave and adhered to its judgment that the maximum rates which it had prescribed were just and reasonable and should be enforced. It is true, but wholly immaterial, that the commissioners held and expressed the view that the war revenue act imposes the tax in question exclusively upon the carrier and precludes it from relieving itself of the expense of affixing and cancelling the stamp required to be attached to each bill of lading, manifest, or other evidence of receipt, by passing that expense on to the shipper and requiring him to submit to an increased rate to that extent. This construction is unsound, but, as we have just said, it is wholly immaterial, for the act of Congress neither prohibits nor authorizes such an increase in rates. Neither expressly nor by implication does it contain
70 any provision on that subject (Crawford *v.* Hubbell and American Express Company *v.* Maynard, decisions by the Supreme Court, April 16, 1900). But the laws of Georgia and the requirements of the railroad commission in pursuance thereof and in accord therewith, while the limitations of the fourteenth amendment of the Constitution of the United States are observed, not only affect but control this carrier as to its Georgia business and prohibit it from increasing its charges beyond the maximum rates prescribed by the commission.

There is nothing in the bill in this case that tends to show that the tariffs of rates and classification and the rules prescribed by the commission and now sought to be enforced by it do not observe the limitations of the Constitution of the United States. The one substantive fact which the bill with reasonable accuracy states is that the payment of the tax imposed by the war-revenue law as required by the order of the railroad commission will aggregate to the South-

ern Express Company in the State of Georgia annually the sum of $42,000, which is repeated further on in this language: "That the payments for said stamps thus required to be made as a part of the rates imposed on the express company and under which it must do business by the order of said commission will result in irreparable damage and injury, and will cause a diminution of income as nearly as can be ascertained of forty thousand dollars per annum and a loss to complainants in a decreased value of their shares of ten thousand dollars;" and further on still the complainants again repeat and "show that the said Southern Express Company and its directors having declared their intention to do so will now pay the said revenue tax out of the income and profits of the company, and will thereby diminish the assets of the company and lessen the dividends thereof and the value of its shares." There is no statement whatever of the amount of income of the company from its Georgia business (intrastate business), nor from its business (interstate business), nor from both together, either gross income or net income or profits of the company. It is stated simply that the tax will aggregate in the State of Georgia annually the sum of $42,000, and that this will cause a diminution of the income—an obvious result as to the net income; but neither the substantive fact averred nor the obvious conclusion tends to show that the commission has hitherto trenched upon or is about to trench upon the limita-
71 tions of the Constitution, and thus present a case within the remedial jurisdiction of a court of equity. The aggregate amount in the State of Georgia annually of the war-revenue tax, as stated, namely, $42,000, shows the number of shipments by that carrier in that State (whether intrastate alone does not appear) of 4,200,000 annually. The argument of the pleader proceeds and shows that the express company has to make its own arrangements with the railroads for the carrying of its freight on passenger trains; that the contracts of the express company with the railroad companies are matters of negotiation, and the average charge of the railroads is fifty per cent. of the express companies' gross receipts; that it costs the express company forty-three per cent. of its receipts to do its business, and this added to the average of fifty per cent. which must be paid to the railroads makes the total cost to the express company ninety-three per cent. of its receipts; that considerable express business is done at a charge of 10 cents per package, and a very large proportion of its intrastate business is done at a charge of 25 cents per package. "Taking ninety-three per cent. from these charges and there is left a margin of seven-tenths of a cent on the 10-cent package and one and three-quarters of a cent on the 25-cent packages. If the express company is compelled to pay one cent each on the receipts it loses three-tenths of a cent on every 10-cent package, and makes only three-quarters of a cent on the 25-cent packages. This would materially reduce the very moderate profit of the business, and will so reduce the income of the company as to lessen any dividends payable to its shareholders like the complainants." The argument proceeds further that in section 9 of the act of the General Assembly of the State of Georgia approved

December 24, 1896 (Public Laws, 28), to levy and collect a tax for the support of the State government for the years 1897 and 1898, all persons and companies doing an express business and charging the public therefor in the State of Georgia were required to pay two and one-half per cent. on their gross receipts, and all persons or the superintendent of general agent of each express company were required to make a quarterly return under oath in the form therein prescribed under the penalty of indictment, conviction, and punishment, pursuant to section 1039
72 of volume 3 of the Code of 1895, and a failure to pay the tax will subject such corporation to a forfeiture of its charter. We notice this argument only to say that the "considerable express business done at a charge of 10 cents per package" is not affected by the action of the commission, because a reference to the tariffs prescribed by it, referred to in the bill and made a part of the record, shows that the lowest maximum rate prescribed therein is 25 cents, and the adding of one cent to the 10-cent rate would not make a rate in excess of that allowed by the commission's tariff. We suggest, further, that the argument shows no reason why the tax imposed by the Government of the United States should be added to the commission's rates that does not apply with at least equal force to the tax of two and one-half per cent. on their gross receipts which the State government is shown to have levied. We say with at least equal force; we think with greater force, because this last tax would adjust itself to the shipments uniformly, and one who shipped a small package or a package for a short distance at the rate of 10 cents would not be required to pay as much as one who shipped a larger package for a longer distance at the maximum rate shown in the commission's tariffs at $1.40 per hundred pounds. The increase made on this basis would be uniform and not unjustly discriminative between shippers, while the increase which the carrier proposes to make by adding the tax imposed by the war-revenue act does manifestly discriminate largely and unjustly between the shipper of a small package for a short distance at a low rate and the shipper of a larger package the longer distance at the larger rate. Though each shipper is charged one cent, the relation of this charge to the service is unequal. Further, it does not appear but that the fifty per cent. of the express company's gross receipts which the railroads impose upon it by negotiation, and which charge more largely diminishes the revenues of the express carrier, should not with equal justice and reason be added to the maximum rates prescribed by the commission. This is absurd and is suggested only to illustrate the utter want of force in the argumentative pleading which the bill attempts to put in the place of a showing of substantive facts.

It seems clear to us that the bill makes no case for the
73 interference of a court of equity to restrain the action of the railroad commission of Georgia, and that the demurrer, though some of its special grounds which we have not recited may have been not well taken, should have been sustained. This disposes of the appeal and of the cross-appeal.

It is therefore—

Ordered that the decree of the circuit court be, and the same is hereby, reversed, and that the suit be, and it is hereby, dismissed at the costs of the complainants.

74 United States Circuit Court of Appeals, Fifth Circuit, November Term, 1898.

Filed June 16*m*, 1900.

L. N. TRAMMELL ET AL., Railroad Commissioners of the State of Georgia, Appellants,
vs.
WILLIAM B. DINSMORE ET AL., Appellees.

WILLIAM B. DINSMORE ET AL., Cross-appellants,
vs.
SOUTHERN EXPRESS COMPANY, L. N. TRAMMELL, *et al.*, Railroad Commissioners of the State of Georgia, Cross-appellees.

No. 820.

Appeal and cross-appeal from the circuit court of the United States for the southern district of Georgia.

SHELBY, circuit judge, dissenting:

I respectfully dissent from the opinion of the court in this case. The opinion concludes with the proposition that the demurrer to the bill should have been sustained. No decree was rendered by the circuit court either overruling or sustaining the demurrer. It is true that errors are assigned predicated upon the failure of the circuit court to sustain the demurrer to the bill, but in advance of a decree on the demurrer no question, I think, is raised in that regard for review here. The court, after holding in the opinion that the demurrer should have been sustained, directs that the bill be dismissed. If the bill, on a hearing on the special demurrers, had been found deficient in its statement of facts it is usual and it would have been proper to allow amendment. The bill should not, I think, be dismissed by this court for defects in the statement of facts pointed out by special demurrers before the demurrers are decided by the circuit court.

The decree appealed from, rendered on March 7, 1899, is given in the foot-note. Judge Speer's opinion is reported in 92
75 Fed. Rep., 714. I think the decree is sustained by the authorities cited in the opinion, and that it should be affirmed.

The seventh paragraph of the bill shows the order made by the railroad commission and why it was made: "That certain citizens of Georgia refused to furnish the stamps to be attached to the receipts or bills of lading or to pay for the same if furnished by the express company, and thereupon complained to the railroad commission of the State of Georgia, to wit, the said Trammell, Crenshaw, and Atkinson, who on July 11, 1898, issued an order as fol-

lows: 'It being represented to the railroad commission of Georgia that the Southern Express Company, a corporation engaged as an express company within this State in the business of a common carrier of goods and merchandise for hire, since the passage by the Federal Congress of an act approved June 13, 1898, entitled "An act to provide ways and means to meet war expenditures, and for other purposes," has exacted and continues to exact from the shippers as a condition precedent to forwarding any goods tendered to it for transportation between points within this State the payment of a special tax upon such shipments imposed by said act, thus indirectly increasing the cost of transportation beyond the rate fixed therefor by this commission, it is ordered that the Southern Express Company do appear before this commission on the 18th day of July, 1898, then and there to show cause, if any it can, why it should not be held to have violated the rules and regulations of this commission by the exactions or overcharges as aforesaid, and why suit should not be instituted against it in every case of such overcharges for the recovery of the penalty provided by law for such illegal act.' Cause was shown respectfully denying all jurisdiction in the premises on the part of said commission, who on August 2, 1898, ordered and directed the said stamp tax to be furnished, attached, cancelled, and paid by the said Southern Express Company alone, and not by the shippers, in whole or in part."

The purport and effect of the order is to so construe the act of Congress of July 13, 1898, as to make it incumbent on the express company to pay the tax therein prescribed, and to hold that the express company cannot cast the burden of the tax on the
76 shipper without making the rates unreasonable and exceeding the rate of charges previously fixed by the railroad commission.

In the case of The American Express Company *v.* Maynard, attorney general of the State of Michigan, decided April 16, 1900, the Supreme Court holds that there is nothing in the act of Congress levying the tax that prevents the express company from adding the tax to the charges made by it.

The order was unquestionably made by the railroad commission on the theory that the act of Congress required the Southern Express Company to pay the tax, and that it forbade the company to shift the burden on the shipper. The Supreme Court in the case cited has not construed the act of Congress on the question as to who is required to pay the tax, but it has decided that, conceding that the act requires the express company to pay it, there is nothing in the act to prevent the company from casting the burden of the tax on the shipper. The rates charged by the express company were prescribed as reasonable by the railroad commission of Georgia. The complaint in the order of July 11, 1898, is that the express company has required the shippers to pay the special tax, 'thus indirectly increasing the cost of transportation beyond the rate therefor fixed by the commission." The authority conferred on the railroad commission is to fix reasonable rates. The order of the commission cannot be justified on the theory that the charges of the

express company, with the taxes added, are unreasonable. If the rate which the commission has fixed was reasonable, it certainly does not make it unreasonable to add to it the increased cost of transportation caused by the act of Congress. As the commission fixed the rate, the order complained of must have been made on the assumption that the act of Congress places the tax on the express company and deprives it of the right to shift the burden by contract.

In The American Express Company *v.* Maynard, *supra*, the Supreme Court said: "As there was no allegation that the rates existing prior to the imposition of the one-cent-stamp tax were unreasonable, it would follow that the rates which were otherwise reasonable were decided not to be so solely because there was added to the charge for each package the exact amount of the increased cost for transporting the package, occasioned as to each package by the specific imposition on each by the act of Congress of the one-cent-
77 stamp tax. But to cause rates which were conceded to be reasonable to become unreasonable because alone of such increased charge the assumption must be made that the act of Congress not only imposed the burden of the tax solely on the express company, but also forbade its shifting the same by any and every method."

The order of the railroad commission prescribes who shall pay the tax and who shall not pay it, and in effect prevents any contract between the shipper and the carrier in reference to the payment of the tax. This order is evidently based on an erroneous construction of the act of Congress. It is assumed by the commission that the act requires the express company to pay the tax, and forbids the express company from making any agreement which shifts the burden upon the shipper. A brief quotation from the case last cited will show the conclusion of the Supreme Court on this point: "A tax rests upon real estate. Can it be said that by the law imposing such a tax it was intended to prevent the owner of real property from taking into consideration the amount of a tax thereon in determining the rent which is to be exacted by him? A tax is imposed upon stock in trade. Must it be held that the purpose of such a law is to regulate the price at which the goods shall be sold and restrain the merchant, therefore, from distributing the sum of the tax in the price charged for his merchandise? As the means by which the burden of taxes may be shifted are as multiform and as various as is the power to contract itself, it follows that the argument relied on if adopted would control almost every conceivable form of contract and render them void if they had the result stated. Thus the price of all property, the result of all production, the sum of all wages, would be controlled irrevocably by a law levying taxes if such a law forbade a shifting of the burden of the tax and avoided all acts which brought about that result.

It cannot be doubted that to adopt by implication the view pressed upon us would be to virtually destroy all freedom of contract, and its final analyses would deny the existence of all rights of property."

The order made by the commission and enjoined by the circuit court cannot be held to be one fixing reasonable rates to be charged by the express company. The commission had already performed that duty. If, in view of changed conditions, the commission had made a new schedule of charges, and in doing so had not exceeded its authority, there would be no cause of complaint. But the order cannot be treated as one fixing a new schedule of charges. The one formerly fixed remains unchanged, and the present order in effect says to the express company, "You shall not require the shipper of packages to pay the one-cent tax. You shall not contract with him to secure its payment by him. You shall furnish, attach, and cancel the stamp. The shipper shall not do it in whole or in part." The order is one forbidding certain contracts prior to the shipment of the goods by the express company. The express company is to be subjected to the suits and penalties, not for violating any new schedule prescribed, but for the making of contracts which shift the burden of the tax. The railroad commission seeks to accomplish by its order what was done by the writ of mandamus by the State courts in Michigan; but the Supreme Court in reversing the decree of the supreme court of Michigan has, it seems to me, established a construction of the act of Congress in direct conflict with the theory on which the railroad commission of Georgia acted. American Express Company *v.* Maynard, *supra*.

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I think that the circuit court was right in holding that the "railroad commission had no jurisdiction to adjudge and designate the party who shall pay the tax." The order made by the commission requires "the stamp tax to be furnished, attached, cancelled, and paid by the Southern Express Company alone and not by the shippers in whole or in part." In effect, the command is that the express company shall pay it and that the shipper shall pay no part of it, and that the shipper and the carrier shall not be permitted to make any contract for its payment in whole or in part by the shipper.

I concur in the views expressed by the court that a State has power to prescribe the charges of public carriers for the carriage within the State of persons and merchandise. This power is, of course, subject to the limitation that the carriage cannot be required without reward or upon conditions amounting to the taking of property for public use without just compensation. I do not deny or question the right of the State to tax, control, and regulate, subject to constitutional limitations, any business carried on by corporations or individuals within its limits. Conceding all this, where does the commission get the right to say who shall and who shall not pay a Federal tax? It is the theory of our system of government that the State and the nation alike are to exercise their powers respectively, each without hindrance from the other. This theory, by necessary implication, excludes wholly any interference by either with an independent exercise by the other of its constitutional powers. Cooley on Taxation (2nd ed.), 83. The State tribunals must in proper cases construe Federal laws, subject to the final decision of the Supreme

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Court, but neither the legislature of a State nor a commission created by it has authority to make laws or orders directing who shall or shall not pay a tax constitutionally levied by the United States. Surely such orders cannot be valid in cases where they would tend to embarrass the Government in the collection of the tax. The order in question does not purport to be one regulating the charges to be made by the express company. It is, in terms, one laying down a rule as to who shall and who shall not pay a stamp tax to the United States. It is applicable to all packages, whether or not the stamp, if treated as an additional charge, makes the whole charge exceed the rates previously fixed by the commission. The order, it seems to me, not only embodies an erroneous construction of the revenue law, but its enforcement may materially interfere with the collection of the tax. The question of the taxing powers of the States as their exercise has affected the functions of the Federal Government has often been considered by the Supreme Court, and the right of the States to impede or embarrass the constitutional operations of the General Government or the rights of its citizens by levying taxes has been always denied. Crandall *v.* State of Nevada, 6 Wall., 35. If the States can interfere by prescribing regulations as to the collection of the revenues of the Federal Government and can say who shall and who shall not pay a prescribed tax and forbid contracts between citizens in reference to it which are permissible under the statute creating the tax, then the States have the right and power to embarrass and impede at a vital point the operations of
80 the General Government. The same policy and law which forbids the States to tax the instrumentalities of the Federal Government should deprive them of the power to embarrass, prevent, or regulate the collection of revenues levied under its constitutional powers.

The Supreme Court has said on two occasions, Chief Justice Marshall delivering the opinions, that "the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government." M'Culloh *v.* The State of Maryland, 4 Wheat., 316; Weston *v.* The City Council of Charleston, 2 Pet., 449.

Is it not clear that the order of the railroad commission seeks "to control the operation" of the law enacted by Congress? It pointedly says who shall and who shall not pay the tax levied by the act. It forbids lawful contracts on the subject. It impedes the collection of the tax by saying that it shall not be paid by certain persons who otherwise might pay it.

If the State can create a commission to make the order in question, has it not equal authority to regulate by statutes and commissions the attaching, canceling, and furnishing of the stamps on checks, conveyances, leases, and other instruments, and on patent medicines, matches, and other articles taxed by the statute? If the administration of the United States revenue laws is subject to State supervision, is there any reason why the post-offices within the State and the stamps there used should escape the same jurisdiction?

If for some reason not apparent to me it be true that the commission may control and regulate the payment of the tax, it must be done within legal restrictions. The commission cannot be permitted to make orders construing the Federal statute which in effect deprive the express company of its property without due process of law or which forces it to carry without compensation. In other words, when the commission fixes rates by regulating Federal taxation it must keep within the same limits that would govern if it sought to perform its functions by direct action. The bill in this case
81 shows that reasonable rates had been previously fixed. It shows that the subsequent order complained of will cause loss to the express company of $42,000 annually on its business in Georgia—that is, that the express company must do business receiving $42,000 less each year than it would receive if paid at the reasonable rates fixed by the commission. The bill also shows that, applying the last order of the commission to the rates now charged by the express company, some of which are below the schedule of the commission, part of the express company's business will be done at an actual loss. The demurrers, if we are to consider them before a decree on them by the circuit court, admit the averments of the bill. These averments, I think, are sufficient to sustain and authorize the preliminary injunction. I am of opinion, therefore, that the bill should not be dismissed.

82 *Foot-note.*

In the Circuit Court of the United States for the Northeastern Division of the Southern District of Georgia.

WILLIAM B. DINSMORE ET AL.	In Equity. Bill, etc.
vs.	Application for Injunction, etc.
THE SOUTHERN EXPRESS COMPANY ET AL.	

The above-stated cause having been duly assigned for hearing on the application for temporary injunction, at Augusta, in said district, on the 10th day of February, 1899, and the parties having been fully heard on the bill and the demurrer thereto, and the court having taken time for advisement—

It is now, upon consideration, ordered, adjudged, and decreed that the prayer that the Southern Express Company be enjoined from voluntarily paying the war-stamp tax in question be, and the same is hereby, denied; ordered, adjudged, and decreed, further, that the defendants The Railroad Commission of Georgia and each member thereof, to wit, the individual defendants Leander N. Trammell, Thomas C. Grenshaw, Jr., and Spencer R. Atkinson, be, and the same are hereby, enjoined from any and all order, direction, action, or legal steps instituting or tending to institute and from any and all proceedings for the recovery of the penalties named in the statute of Georgia in that behalf to enforce compliance with its said order against the Southern Express Company, its officers or agents, as threatened in the order of said commission dated August 2, 1898,

for the reason that said order is null and void and said commission has no jurisdiction to adjudge and designate the party who shall pay said tax.

Ordered, further, that the cause proceed as usual in equity.

March 7th, 1899.

EMORY SPEER,
U. S. Judge.

83 *Certificate.*

I, J. M. McKee, clerk of the United States circuit court of appeals for the fifth judicial circuit, do hereby certify that the foregoing 83 pages, numbered from *a* to 82, inclusive, contain a true, full, and perfect transcript of the record and all proceedings had, including the opinions of the court, in the case of L. N. Trammell *et al.*, railroad commissioners of the State of Georgia, appellants, *vs.* William B. Dinsmore *et al.*, appellees; W. B. Dinsmore *et al.*, cross-appellants; The Southern Express Company, L. N. Trammell *et al.*, railroad commissioners of the State of Georgia, cross-appellees, as fully and completely as the same now remains of record and on file in my office.

Seal United States Circuit Court of Appeals, Fifth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, on this the 16 day of July, A. D. 1900.

J. M. McKEE,
Clerk of the U. S. Circuit Court of Appeals, Fifth Circuit.

Endorsed on cover: File No., 17,875. U. S. circuit court appeals, 5th circuit. Term No., 390. William B. Dinsmore and C. Gray Dinsmore, and William B. Dinsmore, C. Gray Dinsmore, and Dumont Clarke, as executors and trustees under the will of William B. Dinsmore, deceased, petitioners, *vs.* The Southern Express Company, L. N. Trammell, Thomas C. Crenshaw, Jr., and Spencer R. Atkinson, composing the railroad commission of the State of Georgia, *et al.* Filed August 16th, 1900.

84 Supreme Court of the United States, October Term, 1900.

WILLIAM B. DINSMORE and C. GRAY DINSMORE and William B. Dinsmore, C. Gray Dinsmore, and Dumont Clarke, as Executors and Trustees under the Will of William B. Dinsmore, Deceased, Petitioners,

vs.

THE SOUTHERN EXPRESS COMPANY; L. N. TRAMMELL, Thomas C. Crenshaw, Jr., and Spencer R. Atkinson, Composing the Railroad Commission of the State of Georgia, *et al.*

No. 390.

On petition for writ of certiorari to the United States circuit court of appeals for the fifth circuit.

Writ of certiorari having issued October 23, 1900, directed to the judges of the United States circuit court of appeals for the fifth circuit under and pursuant to the above-stated petition; and it appearing that there was filed with the petition for certiorari August 16th, 1900, a transcript of the record and proceedings in the said cause in the circuit court of appeals for the fifth circuit, it is hereby stipulated and agreed between the counsel of the respective parties, that the transcript so of file may be taken as a return to the writ of certiorari, and the clerk of the circuit court of appeals for

85 the fifth circuit, upon filing hereof in that court, may transmit and send up with his return to the writ of certiorari a certified copy of this stipulation, the same to stand in place of and in lieu of a separate and independent original transcript of the record and proceedings so of file in the Supreme Court of the United States, and to stand and be treated as if made in response to said writ of certiorari.

Oct. 27, 1900.

(Signed) FRANK H. MILLER,
Solicitor for William B. Dinsmore and C. Gray Dinsmore and William B. Dinsmore, C. Gray Dinsmore, and Dumont Clarke, as Executors and Trustees under the Will of William B. Dinsmore, Deceased.

(Signed) JOSEPH M. TERRELL,
Solicitor for L. N. Trammell, Thomas C. Crenshaw, Jr., and Spencer R. Atkinson, Composing the Railroad Commission of the State of Georgia.

(Signed) FLEMING G. DU BIGNON,
Solicitor for the Southern Express Company.

(Endorsed:) Filed October 31, 1900. J. M. McKee, clerk.

86 United States Circuit Court of Appeals for the Fifth Circuit.

I, J. M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing two pages, numbered from one to two, inclusive, contain a true copy of the

agreement of counsel in reference to return to writ of certiorari in the case of Wm. B. Dinsmore *et al. vs.* The Southern Express Company *et al.*, No. 820, as the same remains upon the files and records of said United States circuit court of appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, this first day of November A. D. 1900.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

J. M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

87 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the fifth circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which L. N. Trammell, Thomas C. Crenshaw, Jr., and Spencer R. Atkinson, composing the railroad commission of the State of Georgia, are appellants, and William B. Dinsmore and C. Gray Dinsmore, and William B. Dinsmore and C. Gray Dinsmore and Dumont Clarke as executors and trustees under the will of William B. Dinsmore, deceased, are appellees, and William B. Dinsmore and C. Gray Dinsmore, and William B. Dinsmore, C. Gray Dinsmore and Dumont Clarke, as executors and trustees under the will of William B. Dinsmore, deceased, are appellants and The Southern Express Company *et al.*, are appellees, which suit was removed into the said circuit court of appeals by virtue of appeals from the circuit court of the United States for the southern district of Georgia, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United
88 States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 23d day of October, in the year of our Lord one thousand nine hundred.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

89 UNITED STATES OF AMERICA, }
Fifth Judicial Circuit. }

The within writ received October 31, 1900. For return thereto I, J. M. McKee clerk of the United States circuit court of appeals for the fifth circuit, by direction of the judges of said court, and in accordance with the written stipulation of the parties filed in said

cause, a certified copy of which is attached hereto and made a part of this return, do hereby certify that the record now on file in the office of the clerk of the Supreme Court of the United States in the cause named in the within writ is a true, full and correct transcript of the record of said cause in said circuit court of appeals, as the same now remains on file and of record in my office.

Given under my hand and the seal of said court hereto affixed at the city of New Orleans, this the first day of November, A. D. 1900.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

J. M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

[Endorsed:] File No. 17875. Supreme Court of the United States. No. 136, October term, 1901. Wm. B. Dinsmore *et al.*, *vs.* The Southern Express Co. *et al.* Writ of certiorari and return. Filed Nov. 9, 1900.

No. 390. 136

Brief of Miller for Petitioner. 390

Office Supreme Court U.S.
FILED
AUG 16 1900
JAMES H. MCKENNEY
Clerk.

Filed Aug. 16, 1900.

IN THE

Supreme Court of the United States.

WILLIAM B. DINSMORE, et al,
Appellants.

vs.

THE RAILROAD COMMISSIONERS OF THE STATE OF GEORGIA, et al,
Appellees.

WILLIAM B. DINSMORE, et al.,
Appellants.

vs.

THE SOUTHERN EXPRESS CO., et al.,
Appellees.

Petition for Writ of Certierari.

FRANK H. MILLER, Attorney for Appellants,
705 Broad Street, Augusta, Georgia.

To the Railroad Commissioners of the State of Georgia, and to the Honorable Joseph M. Terrell, Attorney-General of the State of Georgia and Solicitor of the said Commissioners.

Also, to the Southern Express Company.

PLEASE TAKE NOTICE.

That on Monday, October 15, 1900, at the opening of the Supreme Court of the United States on that day, or as soon thereafter as counsel can be heard, a petition will be presented to the Court by William B. Dinsmore and others, and application made for the issuing of the writ of certiorari to be directed to the Circuit Court of Appeals of the United States for the Fifth Circuit, to bring up for the review and determination of the Supreme Court of the United States and for such other proceedings as shall seem best to that Court, a transcript of the record including the decision of the said Circuit Court of Appeals rendered June 1st, 1900, in the case of L. N. Trammell, et al., against William B. Dinsmore, et al., and the cross appeal of William B. Dinsmore, et al., against the Southern Express Company, being No. 820 on the docket of the said Fifth Circuit Court of Appeals.

(Signed.) FRANK H. MILLER,
Solicitor for W. B. Dinsmore, et al.

Service of the above notice is hereby acknowledged and copy received this day by me as Attorney-General of the State of Georgia and Solicitor for the Railroad Commissioners thereof.

JOSEPH M. TERRELL,
August 4, 1900. Attorney-General and Solicitor.

Service of the above notice is hereby acknowledged and copy received by the Southern Express Company.

F. G. DUBIGNON,
August 7, 1900 General Counsel So. Ex. Co.

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

Ex Parte
WILLIAM B. DINSMORE, ET AL.,
PETITIONERS.

Petition for writ of certiorari, requiring the Circuit Court of Appeals for the Fifth Circuit to certify to the Supreme Court for its review and determination, the case of the Railroad Commission of Georgia vs. W. B. Dinsmore, et al., being No. 820 in that Court, wherein the said Railroad Commission were the appellants, and your petitioners, W. B. Dinsmore, et al., respondents.

To the Honorable the Supreme Court of the United States:

The petition of William B. Dinsmore and C. Gray Dinsmore, and said William B. Dinsmore and C. Gray Dinsmore and Dumont Clark, as executors and trustees under the will of William B. Dinsmore, deceased, respectfully show to this honorable Court as follows:

1. Your petitioners are citizens of the State of New York, resident in the city of New York, and are stockholders in the Southern Express Company, a corporation created by and existing under the laws of the State of Georgia, having its principal place of business in the city of Augusta, Ga., in the northeastern division of the Southern District of Georgia, your petitioner, William B. Dinsmore, being the owner of 100 shares of said stock, and your petitioners, trustees and executors of the estate of William B. Dinsmore, owning 800 shares of said stock, of the par value of $50,000 or other large sum, while the aggregate number of the shares of said company outstanding amount to 50,000, and are divided among a large number of persons.

2. That the said Southern Express Company does a regular express business as a common carrier—to carry small packages quickly from place to place throughout the Southern States, and within the limits of the State of Georgia, was so engaged on the 13th day of June, 1898, and is now so engaged.

3. That on the 13th day of June, 1898, the Congress of the United States passed an act entitled "An act to provide ways and means to meet

war expenditures and for other purposes," section six of which act required that on and after the •

"first day of July, eighteen hundred and ninety-eight, there shall "be levied, collected, and paid, for and in respect of the several "bonds, debentures, or certificates of stock, and of indebtedness and "other documents, instruments, matters, and things mentioned "and described in Schedule A of this act, or for and in respect of "the vellum, parchment, or paper upon which such instruments, "matters, or things, or any of them, shall be written or printed by "any person or persons or party *who shall make, sign, or issue the "same*, OR *for whose use or benefit* the same shall be made, signed, "or issued, the several taxes or sums of money set down in figures "against the same, respectively, or otherwise specified or set forth "in the said schedule."

And in Schedule A, attached to the twenty-fifth section of said act, appears the language, as follows:

"Express and freight.—It shall be the duty of every railroad and "steamboat company, carrier, express company, or corporation, or "person whose occupation is to act as such, to issue to the shipper "or consignor, or his agent, or the person from whom any goods "are accepted for transportation a bill of lading, manifest, or other "evidence of receipt and forwarding for each shipment received for "carriage and transportation, whether in bulk or in boxes, bales, "packages, bundles, or not so enclosed or included; and there shall "be duly attached and cancelled as in this act provided to each of "such bills of lading, manifests, or other memorandum, and to each "duplicate thereof, a stamp of the value of one cent. Any failure "to issue such bill of lading, manifest, or other memorandum as "therein provided shall subject such railroad or steamboat com-"pany, carrier, express company, or corporation or person to a pen-"alty of fifty dollars for each offense, and no such bill of lading, "manifest, or other memorandum shall be used in evidence unless "it shall be duly stamped as aforesaid."

That the penalty prescribed by the said act of Congress, section 7, for the issuance of a paper without being duly stamped is indictment as for misdemeanor and, upon conviction, payment of a fine of not more than $100, in the discretion of the Court, and such instrument, document, or paper shall not be competent evidence in any Court.

4. That after the approval of the said act of Congress, June 13, 1898, and when it became operative, the said Southern Express Company asked and demanded the production by its customers of the stamp required to be attached under the provisions of the said act at the issuing of its receipts or bills of lading, said express company insisting that it should not carry any package or issue its receipt therefor until the sender or shipper furnished the necessary governmental stamp therefor, as required by said act.

5. That certain citizens of Georgia refused to furnish the stamps to be attached to the receipts or bills of lading or to pay for the same if furnished by the express company, and thereupon complained to the railroad commissioners of the State of Georgia, to wit: Trammel, Crenshaw, and Atkinson, who, on July 11, 1898, issued an order, as follows:

"It being represented to the railroad commission of Georgia "that the Southern Express Company, a corporation engaged as an "express company within this State in the business of a common "carrier of goods and merchandise for hire, since the passage by "the Federal Congress of an act, approved June 13, 1898, entitled "'An act to provide ways and means to meet war expenditures, "'and for other purposes,' has exacted and continues to exact from "shippers as a condition precedent to forwarding any goods ten- "dered to it for transportation between points within this State "the payment of a special tax upon such shipments imposed by "said act, thus indirectly increasing the cost of transportation "beyond the rate fixed therefor by this commission, it is—

"Ordered that the Southern Express Company do appear before "this commission on the 18th day of July, 1898, then and there "to show cause, if any it can, why it should not be held to have "violated the rules and regulations of this commission by the ex- "actions or over-charges, as a foresaid, and why suit should not be "instituted against it in every case of such overcharges for the "recovery of the penalty provided by law for such illegal act."

Cause was shown respectfully denying all jurisdiction in the premises on the part of the said commission, who, on August 2, 1898, ordered and directed the said stamp tax to be furnished, attached, cancelled, and paid by the said Southern Express Company alone, and not by the shippers, in whole or in part.

6. That by paragraph 1, section 2, article IV, of the constitution of Georgia, of December 21, 1877, section 5797 of the Civil Code, it is ordained that the power and authority of regulating railroad freights and passenger tariffs, preventing unjust discriminations, and requiring reasonable and just rates of freight and passenger tariff, were thereby conferred upon the General Assembly, whose duty it shall be to pass laws, from time to time, to regulate freight and passenger tariffs, to prohibit unjust discriminations on the various railroads of the State, and prohibit said roads from charging other than just and reasonable rates, and enforce the same by adequate penalties; that, acting under this constitutional provision, the General Assembly of the State of Georgia passed an act October 14, 1879, to carry the same into effect, which was enlarged by the acts of December 18, 1890, October 16, 1891, August 31, 1891, and October 17, 1891, which said acts now comprise sections 2185 to 2217 of the Civil Code of the State of Georgia, to which express reference is hereby made as if set out herein; that by another act, approved October 21, 1891, the General Assembly passed an act extending the powers of the railroad commissioners so as to give them power and authority to *regulate charges for express companies for transportation*, and

to apply the powers given the said commissioners by law over railroad companies to all companies or persons owning, controlling, or operating a line or lines of express, and to make the penalties prescribed against railroads for violating the commissioners' rules apply to the companies or persons therein named, whose line or lines is or are wholly or in part in the State, and for other purposes, the enacting part of which act is now section 2217 of the Civil Code of Georgia; that section 2 of the said act, which is now 2218 of the Civil Code of Georgia, enacts that the powers of the commissioners to regulate charges for corporations, companies, and persons herein referred to shall apply only to charges by express for the transportation from one point to another in the State of Georgia.

7. That, pursuant to the authority delegated to them, the railroad commissioners of Georgia fixed and prescribed rules, tariffs, and classifications governing express companies plying between points within the State of Georgia and submitted the same from time to time to the executive of the said State. To these, as they last appeared in the twenty-fifth report, submitted October 15, 1897, and published and distributed throughout the State, petitioners referred, praying to be excused from annexing a copy on account of the voluminous character and details thereof.

8. That the said Southern Express Company, from the date of the passage of the said legislative act, October 21, 1891, conformed to the rules, orders, and tariffs so adopted by the railroad commission of Georgia, and were continuing to do so when the said act of Congress of June 13, 1898, became operative; that the penalty fixed by the said legislative acts of the State of Georgia for violating any order or rule or regulation of the railroad commission of the State of Georgia is not less than one thousand dollars ($1,000) nor more than five thousand dollars ($5,000) for each offense, to be fixed by the presiding judge in a suit where action is brought against the company, which suits are to be brought by the attorney-general of the State when directed by the said railroad commission.

9. That petitioners were informed and believed that the tax imposed by the said war revenue law of 1898, as required by the said order of the said railroad commission, would aggregate to the Southern Express Company in the State of Georgia, annually, the sum of forty-two thousand dollars ($42,000) or other large sum, and petitioners avered that the said railroad commission were without any authority under the constitution and the legislative acts of the State of Georgia or under the said act of Congress approved June 13, 1898, to require the payment of the said stamp tax by said company, upon and before issuing its receipts and bills of lading; petitioners averring, also, that the express company has to make its own arrangements with the railroads for the carrying of its freight on passenger trains; that the

railroads cannot be compelled to do this for the express company, and there is no prescribed limit to their charges against the Southern Express Company, as they are not charges made against the public; that the contracts of the express company with the railroad companies are matters of negotiation, and the average charge of the railroads is 50 per cent. of the express company's gross receipts; that it costs the express company 43 per cent. of its receipts to do its business, and this, added to the average 50 per cent. which must be paid to the railroads, makes the total cost to the express company 93 per cent. of its receipts. A considerable express business is done at a charge of 10 cents per package, and a very large proportion of its intrastate business is done at a charge of 25 cents per package. Take 93 per cent. from these charges and there is left a margin of seven-tenths of a cent on the 10-cent packages and one three-quarters of a cent on the 25-cent packages. If the express company is compelled to pay one cent each on the receipts, it loses three-tenths of a cent on every 10-cent package and makes only three-quarters of a cent on the 25-cent packages. This would materially reduce the very moderate profit of the business, and will so reduce the income of the company as to lessen any dividends payable to its shareholders, like petitioners. That under section nine of the act of the General Assembly of the State of Georgia, approved December 24, 1896, Public Laws 28—to levy and collect a tax for the support of the State government for the years 1897 and 1898—all persons or companies doing an express business and charging the public therefor in the State of Georgia were required to "pay 2½ per centum on their gross receipts," and all persons or the superintendent or general agent of each express company were required to make a quarterly return under oath, in the form therein prescribed, under a penalty of indictment, conviction, and punishment, pursuant to section 1039 of volume III of the Code of 1895, and a failure to pay the tax will subject such corporation to a forfeiture of its charter; that under the provisions of this act, in the imposition of this tax and the enforcement thereof, no deduction will be allowed for the expense the company is subjected to in complying with the said order of the railroad commission and in making payment itself of the stamp tax imposed by the said revenue act of Congress. In other words, the corporation will be paying a tax to the State upon the entire aggregate sum paid out for stamps, as required by the order of the railroad commission, which payment will come out of the gross income of the company.

10 That petitioners avered that there is no reason to believe that there can be and will be an increase in the local and other State business of said company; that the cost of conducting said business has been fixed by years of experience, and the amounts now paid therefor are the lowest that can be obtained and adopted and by which the public can be satisfactorily served by said express company; that the charges fixed by said commissioners before the passage of the said revenue law were established so as to enable the company to live, operate, and pay a fair dividend or return to its owners for the money and property embarked

in the said business, and that the order of the said commissioners, requiring the payment by the said company of the said one cent stamp on all bills of lading and receipts that it issued for the business done was resolved upon by said commissioners illegally and arbitrarily, and will cause a large reduction in the income of the company; that the enforcement of this order will be unfair, unjust, and unreasonable; that the rates of carriage now imposed require the said express company to carry many classes of freight at barely cost, and the expense incident to said service will in future be materially increased by the stamp aforesaid; that the payments for said stamps thus required to be made as a part of the rates imposed on the express company, and under which it must do business, by the order of said commission, will result in irreparable damage and injury and will cause a diminution of income, as nearly as can be ascertained, of forty thousand dollars ($40,000) per annum and a loss to petitioners in a decreased value of their shares of ten thousand dollars or other large sum.

10. That petitioners were informed and verily believed that, in compliance with the requirements of the orders of the railroad commission of Georgia, as aforesaid, the said The Southern Express Company and its directors had avowed their intention and purpose to comply therewith and take no steps whatsoever to resist the enforcement of the order of the said commissioners for fear of the penalties which may be assessed against them in the event of their non-compliance with the order of the commission.

11. That petitioners duly requested the directors of the express company not to comply with the said order, and on their subsequent refusal of this request petitioners, on the 27th day of October, 1898, filed their bill in the Circuit Court of the United States for the southern district of Georgia, as against the said Southern Express Company and Leander N. Trammell, Thomas C. Crenshaw, Jr., and Spencer R. Atkinson, individually and constituting the railroad commissioners of Georgia, and Joseph M. Terrell individually and as attorney-general of the State of Georgia, whereby petitioners, after reciting the foregoing facts, prayed that the order of the railroad commission of August 2, 1898, requiring the said Southern Express Company to pay the amount of the war revenue tax on business from one point to another in the State of Georgia, without endeavoring to collect the same from shippers, and requiring said company to make the payment thereof before the issuing of express receipts or bills of lading, be decreed to be without jurisdiction on the part of said commission, unconstitutional, null and void, and also that the Southern Express Company should be restrained from complying with said order and paying said war revenue tax and the attorney-general from instituting penalty suits against the express company for the purpose of enforcing the order of the railroad commission and a writ of injunction be granted to complainants.

12. That in reply to this bill the defendants duly entered their appear-

ance, and the railroad commission of Georgia and the attorney-general filed a demurrer thereto upon the following grounds: Because the complainants are not entitled to the relief prayed for and there is no equity in the bill, and for special cause of demurrer that there was a complete and adequate remedy at law; because the court had no jurisdiction to grant the relief prayed for; because the superior courts of the State of Georgia had exclusive jurisdiction of the questions involved, and that the suit was in effect one against the State.

13. That when the application for injunction was argued before his honor, Judge Emory Speer, in said Circuit Court, complainants insisted that as against said commission the construction of the revenue law was not necessarily involved, "as the commission had no power to administer it." Yet, "if in the opinion of the court a construction of the law was involved," a view contrary to that of the commission was submitted, viz: that the stamp duty was to be paid by the person "for whose use or benefit" the express receipt was issued; that this was the shipper, as he needed the receipt for his protection against the carrier—it having his property in its possession to transport by express. The Court, after consideration of the argument, rendered a decision March 7, 1899, adjudging that the prayer that the Southern Express Company be enjoined from voluntarily paying the war stamp tax in question be denied, and further, that the railroad commission be enjoined from taking any steps looking toward the institution of any proceedings for the recovery of penalties named in the statute of Georgia to enforce compliance with the order against the express company, as threatened in said order of August 2, 1898, for the reason that the order was null and void, and that the said commission had no jurisdiction to adjudge and designate the party who was to pay said tax.

The Court at the same time filed his opinion, which appears in the record of this case, filed with this application for certiorari, and is also published in 92 Fed. R., 714.

In his opinion, Judge Speer, referring to the attitude of the express company, said:

> "It had declined to test in the courts the question whether the "war stamp tax on its bills of lading and manifests is payable by "the shipper or by itself. This was done because of the enor-"mous penalties—from one thousand to five thousand dollars fine "in each case—with which it was solemnly threatened by the rail-"road commission unless in five days it abandon its contention "that the shipper must pay the tax, accept all shipments and "itself furnish, affix, and cancel the stamps. This is plain from "the resolution of its directors, in which they state that 'it is "'deemed expedient to comply with the orders of the railroad com-"'mission of Georgia in the premises, in order to avoid penalties "'under the laws of Georgia, and so clouding the company's title "'to its corporate franchises and rights as to embarrass its action.'"

And further, referring to the position of the commission, the Judge said:

"We shall presently see that the commission has as little concern "with the construction of the revenue law as the State, which is "not before the Court. It is true the learned attorney-general in "his brief states that the demurrer presents this question: 'Does "'the act of Congress levy the stamp tax upon the shipper or ex-"'press company, or is it a general or floating tax?' Now, if "the attorney-general of Georgia were the attorney-general of "the United States, and was engaged in an effort to enforce the "payment of the United States tax from the Southern Express "Company, his proposition would probably require judicial deter-"mination. The fact, however, that he appears in this case as the "attorney-general of the State betrays how untenable is his position. "This revenue tax is imposed by the United States. It affects all "the people of all the States. It is national in its character, and "'admits and requires uniformity of regulation and enforcement in "'all of the States.' It follows that its distribution, apportion-"ment, collection, and enforcement is not within the administrative "control of the authorities of a particular State. The respective "spheres of action of the State and United States courts, to use "the apposite illustration of Chief Justice Brown, in Hines and "Hobbs vs. Rawson, 40 Ga., p. 356, are each 'as for beyond the "'reach of the other as if the line between them was traced by "'landmarks and monuments visible to the eye.' Indeed, the "action of the railroad commission, as recited in the bill and ad-"mitted by the demurrer, is not only an appropriation of functions "belonging exclusively to officials of the United States charged "with the collection of the tax, but it is an expansion of its own "authority as defined by the law of the State. This is to be found "in section 2217 of the Civil Code of Georgia, and provides that "all express and telegraph companies doing business in whole or "in part in this State 'shall be under the control of the railroad "'commission of Georgia, who shall have full power to regulate "'the prices to be charged * * * for any service performed "'by any such company or persons, etc.' All of the powers of "the commission relative to railroads are extended by this leg-"islation to include telegraph and express companies. Without "quoting the voluminous enactments defining the powers of the "railroad commission, it will be enough to say that, like the section "of the Code quoted above, so far as they are germane to this con-"troversy they relate to the fixation of rates or prices for trans-"portation or conveyance. In so far as they are penal in effect, "under the familiar rule they must, of course, be strictly construed. "Bearing in mind this cardinal canon of construction with regard "to penal legislation, how unprecedented seems that latitudinous "interpretation which would make *the punishment fixed by the "statute apply to the failure of a corporation to pay a disputed stamp "tax imposed by the United States* upon a written evidence of ship-"ment, required by the United States. *The revenue exaction is no "part of a rate for the shipment of express matter.* It is no part

"of the price for 'a service rendered' the shipper. It is a tax "for national purposes, and its payment or collection is in no "sense directly or indirectly within the sphere 'of a State admin- "'istrative board.' Like the tax on distilled spirits, this is an in- "ternal revenue tax. Should the express company ship a package "of any character in the absence of this stamp on a bill of lading, "it would incur a penalty of $50. If it should accept and know- "ingly 'remove' or ship a package of distilled spirits, unless it "also bore the stamp required by the law, it would be guilty of "an infamous offense, and its officers punished by imprisonment "in the penitentiary. Now, has the railroad commission control "over the shipment of an unstamped cask of liquor? Has it "authority to direct that the express company and not the distiller "shall pay for and attach the stamp? Has it any authority to "threaten the imposition of its crushing penalties on the express "company, and thus compel it to remove the liquor before the "distiller has attached the stamp, which is the evidence that the "tax thereon has been paid. This will scarcely be maintained. "But in either case the duty of the express company must of "necessity be determined by the construction of the United States "law. * * * Upon this preliminary hearing the decision will "therefore be confined to matters distinctly in issue. The prayer "for temporary injunction against the express company will be "denied, and the railroad commission will be enjoined conformably "to the prayers of the bill."

14. The railroad commission, being dissatisfied with the judgment of said Court granting said injunction against them, entered an appeal to the Circuit Court of Appeals for the fifth circuit on March 18, 1899, on the grounds that the Court erred in not sustaining the demurrer upon each ground, and in granting the injunction against them as set out therein; that the Court erred in holding the order of August 2, 1898, null and void; and that the Court erred in holding that defendants did not have competent authority for the institution and prosecution of the suits threatened in said order; that the Court also erred in holding that the action of the express company in compelling the consignor to pay the charges which had been imposed by the war revenue act of 1898 did not amount to an increase of rates as prescribed by the railroad commission; and further, the Court, having taken jurisdiction to prevent a multiplicity of suits respecting the subject matter, erred in not determining whether the express company or the consignor was liable to pay said tax and erred in granting the injunction without determining such matters.

15. That thereupon your petitioners, complainants in said bill, as the said commission had appealed on the ground that the Court erred in holding that the action of the express company in compelling the consignor to pay a charge fixed by the war revenue act did not amount to an increase in rates, also sued out their cross bill March 28, 1899, alleg-

ing that the Court erred in denying the injunction against the express company, as prayed for, and in not enjoining said company from complying voluntarily with the order of the commission of August 2, 1898 and also in refusing to enjoin the express company from paying the war revenue stamp approved June 13, 1898. The Court having held—that as against the express company—its duty

"must of necessity be determined by the construction of the United "States law."

16. That thereafter, on May 16, 1900, said case came up for hearing in the Circuit Court of Appeals for the fifth district, in New Orleans, La., when, after argument had, the Court reserved its decision until June 1st, at or about the time of its final adjournment, when the Court, through a majority of the judges, Messrs. McCormick and Pardee, delivered an opinion sustaining the said action of the railroad commission and ordering—

"that the decree of the Circuit Court be and the same is hereby "reversed, and that the suit be and is hereby dismissed, at the cost "of the complainant."

In the opinion the Court stated:

"It is true, but wholly immaterial, that the commissioners held "and expressed the view that the war revenue act imposed the tax "in question exclusively upon the carrier, and *precludes* it from "relieving itself of the expense of affixing and cancelling the stamp "required to be attached to each bill of lading, manifest, or other "evidence of receipt by passing that expense to the shipper and "requiring him to submit to *an increased rate to that extent.* This "construction is unsound, but, as we have just said, is wholly immaterial, for the act of Congress neither prohibits or authorizes such "increase of rates. Neither expressly or by implication does it "contain any provision on that subject."

Having thus construed the law as contended by petitioners, the Court went on and held that the express company was bound by the said orders of the commission, and that there was nothing in the bill to show—

"that the tariffs of rates and classification and the rules prescribed "by the commission, and now sought to be enforced by it, do not "observe the limitations of the Constitution of the United States," and that there was "no statement whatever of the amount of the "income of the company from its Georgia business (intrastate busi-"nesss) or from its other business (interstate business), nor from "both together—either their gross income or net income or profits "of the company,"

and this notwithstanding that it appeared from the allegations of the bill (paragraph 11) that it cost the express company 95½ per cent. of its gross receipts to do business in the State of Georgia, to wit: 50 per cent. of its gross receipts to the railroad companies for carriage; 43 per cent. for expenses, and 2½ per cent. for State taxes, making 95½ per cent., leaving only 4½ per cent. as a net income on receipts in Georgia, and

which would be further reduced by $42,000 a year in the State of Georgia alone if the cost of the stamp were required to be paid by the company, which result would compel the company to do business at too low a rate, lower than the rates fixed by the commissioners before the passage of the law which rates were established—

"so as to enable the company to live, operate, and pay a fair divi-
"dend or return to the owners for the money and property embarked
"in said business,"

while the order of said commission would cause a large reduction of the income, and the enforcement of the order would be unfair, unjust, and unreasonable; that the rates of carriage thereby imposed required the company to carry many classes of freight barely at cost, and the expense in future would be increased by the stamp, and that the payment for said stamps thus required to be made a part of the rates imposed on the express company under which it must do business, by the order of the said commission,

"would result in irreparable damage and injury, and would cause
"a diminution of income, as nearly as can be ascertained, of $40,000
"per annum, and a loss to complainants in the decreased value of
"their shares of $10,000 or other large sum."

The demurrer of the commissioners admitted these allegations to be true, yet the Court sustained the order of the commission designating that the company was to pay the stamp duty and held that no case was made "to restrain the action of the railroad commission of Georgia."

Speaking of rates the Court said:

"the increase which the carrier proposes to make by adding the
"tax imposed by the war revenue Act does manifestly discriminate,
"largely and unjustly, between the shipper of a small package for
"a short distance at a low rate, and the shipper of a larger pack-
"age the longer distance at the larger rate. Though each shipper
"is charged one cent, the relation of this charge to the service is
"unequal."

That to this decision Circuit Judge Shelby filed his dissent June 16, 1900, and stated that, in his opinion, Judge Speer's decision was correct and should be affirmed and, after reviewing the case somewhat, said—

"The commission on August 2, 1898, *ordered and directed the said*
"*stamp tax to be furnished, attached, cancelled, and paid by the said*
"*Southern Express Company alone, and not by the shippers, in whole*
"*or in part.*

"The purport and effect of the order is to so construe the act of
"Congress of July 13, 1898, as to make it incumbent on the express
"company to pay the tax therein prescribed, and to hold that the
"express company cannot cast the burden of the tax on the shipper
"without making the rates unreasonable and exceeding the rate of
"charges previously fixed by the railroad commission.

"In the case of the *American Express Company* v. *Maynard,*
"*Attorney-General of the State of Michigan*, decided April 16, 1900,
"the Supreme Court holds that there is nothing in the act of Con-

"gress levying the tax that prevents the express company from "adding the tax to the charges made by it.

"The order was unquestionably made by the railroad commission "on the theory that the act of Congress required the Southern "Express Company to pay the tax, and that it forbade the com- "pany to shift the burden to the shipper. The Supreme Court, in "the case cited, has not construed the act of Congress on the ques- "tion as to who is required to pay the tax, but it has decided that, "conceding that the act required the express company to pay it, "there is nothing in the act to prevent the company from casting "the burden of the tax on the shipper. The rates charged by the "express company were prescribed as reasonable by the railroad "commission of Georgia. The complaint in the order of July 11, "1898, is that the express company has required the shippers to "pay the special tax, 'thus indirectly increasing the cost of trans- "'portation beyond the rate therefor fixed by the commission.' "The authority conferred on the railroad commission is to fix rea- "sonable rates. The order of the commission can not be justified "on the theory that the charges of the express company, with the "taxes added, are unreasonable. If the rate which the commission "has fixed was reasonable, it certainly does not make it unreasona- "ble to add to it the increased cost of transportation, caused by the "act of Congress. As the commission fixed the rate, the order "complained of must have been made on the assumption that the "act of Congress places the tax on the express company and "deprives it of the right to shift the burden by contract.

"In the *American Express Company* v. *Maynard*, *supra*, the "Supreme Court said: 'As there was no allegation that the rates "'existing prior to the imposition of the one cent stamp tax were "'unreasonable, it would follow that the rates which were other- "'wise reasonable were decided not to be so solely because there "'was added to the charge for each package the exact amount of "'the increased cost for transporting the package, occasioned as to "'each package by the specific imposition on each by the act of "'Congress of the one cent stamp tax. But to cause rates which "'were conceded to be reasonable to become unreasonable, because "'alone of such increased charge, the assumption must be made "'that the act of Congress not only imposed the burden of the tax "'solely on the express company, but also forbade its shifting the "'same by any and every method.'

"The order of the railroad commission prescribes *who shall pay "the tax and who shall not pay it*, and in effect prevents any contract "between the shipper and the carrier in reference to the payment "of the tax. This order is evidently based on an erroneous con- "struction of the act of Congress. It is assumed by the commission "that the act required the express company to pay the tax, and "forbids the express company from making any agreement which "shifts the burden upon the shipper. * * *

"The order made by the commission and enjoined by the Circuit "Court can not be held to be one fixing reasonable rates to be "charged by the express company. The commission had already "performed that duty. If, in view of the changed conditions, the "commission had made a new schedule of charges, and in doing so "had not exceeded its authority, there would be no cause of com- "plaint. But the order can not be treated as one fixing a new "schedule of charges. The one formerly fixed remains unchanged, "and the present order in effect says to the express company: 'You "'shall not require the shipper of packages to pay the one cent "'tax; you shall not contract with him to secure its payment by "'him; you shall furnish, attach, and cancel the stamp; the ship- "'per shall not do it in whole or in part.' The order is one forbid- "ding certain contracts prior to the shipment of the goods by the "express company. The express company is to be subjected to the "suits and penalties, *not for violating any new schedule prescribed, "but for the making of contracts which shift the burden of the tax.* "The railroad commission seeks to accomplish by its order what "was done by the writ of mandamus by the State courts in Michi- "gan. But the Supreme Court, in reversing the decree of the "Supreme Court of Michigan, has, it seems to me, established a "construction of the act of Congress in direct conflict with the "theory on which the railroad commission of Georgia acted. *Ameri- "can Express Company* v. *Maynard, supra.*

"I think the Circuit Court was right in holding that the 'rail- "'road commission had no jurisdiction to adjudge and designate the "'party who shall pay the tax.' The order made by the commis- "sion requires 'the stamp tax to be furnished, attached, cancelled, "'and paid for by the Southern Express Company alone, and not "'by the shippers in whole or in part.' In effect, the command is "that the express company shall pay it and that the shipper shall "pay no part of it, and that the shipper and the carrier shall not be "permitted to make any contract for its payment, in whole or in "part, by the shipper.

"I concur in the views expressed by the Court that the State has "power to prescribe the charges of public carriers for the carriage "within the State of persons and merchandise. The power is, of "course, subject to the limitation that the carriage can not be re- "quired without reward or upon conditions amounting to the taking "of property for public use without just compensation. I do not "deny or question the right of the State to tax, control, or regu- "late, subject to constitutional limitations, any business carried on "by corporations or individuals within its limits. Conceding all "this, *where does the commission get the right* to say who shall and "who shall not pay a federal tax? It is the theory of our system "of government that the State and the nation alike are to exercise "their powers respectively, each without hindrance from the other. "This theory, by necessary implication, excludes wholly any inter- "ference by either with the independent exercise by the other of

"its constitutional powers. Cooley on Taxation (2d ed.), 83:
"'The State tribunals must, in proper cases, construe federal laws,
"'subject to the final decision of the Supreme Court, but neither
"'the Legislature of a State, nor a commission created by it, has
"'authority to make laws or orders directing who shall or who
"'shall not pay a tax constitutionally levied by the United States.'
"Surely such orders can not be valid in cases where they would
"tend to embarrass the government in the collection of the tax.
"The order in question does not purport to be one regulating the
"charges to be made by the express company. It is in terms one
"laying down a rule as to who shall and who shall not pay a stamp
"tax to the United States. It is applicable to all packages, whether
"or not the stamp, if treated as an additional charge, makes the
"whole charge exceed the rates previously fixed by the commis-
"sion. The order, it seems to me, not only embodies an erroneous
"construction of the revenue law, but its enforcement may materi-
"ally interfere with the collection of the tax. The question of the
"taxing powers of the States, as their exercise has affected the
"functions of the federal government, has been often considered
"by the Supreme Court, and the right of the States to impede or
"embarrass the constitutional operations of the general government
"or the rights of its citizens by levying taxes has been denied.
"*Crandall* v. *State of Nevada*, 6 Wall., 33. If the States can inter-
"fere by prescribing regulations as to the collection of the revenues
"of the Federal Government, and can say who shall and who shall
"not pay a prescribed tax, *and forbid contracts* between citizens in
"reference to it which are permissible under the statute creating
"the tax, then the States have the right and power to embarrass
"and impede at a vital point the operations of the general govern-
"ment. The same policy and law which forbids the States to tax
"the instrumentalities of the Federal Government should deprive
"them of the power to embarrass, prevent, or regulate the collection
"of revenues collected under its constitutional powers.

"The Supreme Court has said on two occasions, Chief Justice
"Marshall delivering the opinions, that 'the States have no power
"'by taxation, or otherwise, to retard, impede, burden, or in any
"'manner control the operation of the constitutional laws enacted
"'by Congress to carry into execution the powers vested in the gen-
"'eral government.' *McCulloch* v. *The State of Maryland*, 4
"Wheat., 316; *Weston* v. *The City Council of Charleston*, 2 Pet., 449.

"Is it not clear that the order of the railroad commission seeks
"'to control the operation' of the law enacted by Congress? It
"pointedly says who shall and who shall not pay the tax levied by
"the Act. It forbids lawful contracts on the subject. It impedes
"the collection of the tax by saying that it shall not be paid by
"certain persons who otherwise might pay it.

"If the state can create a commission to make the order in
"question, has it not equal authority to regulate by statutes and
"commissions the attaching, cancelling and furnishing of the

"stamps on checks, conveyances, leases, and other instruments;
"and on patent medicines, matches and other articles taken by the
"statute? If the administration of the United States revenue
"laws is subject to state supervision, is there any reason why the
"post offices within the state and the stamps there used should
"escape the same jurisdiction? and accordingly incident that there
"was equity in the bill and that it should not have been dismissed."

17. That your petitioners show that they are dissatisfied with the said judgment of a majority of the judges of the said Circuit Court of Appeals. That the decision in question went beyond the matters considered by the Circuit Court, that Court having granted but a temporary injunction against the Commission, and had not disposed of the demurrers filed by the said Commission, nor had there been any answer or other pleading from the Southern Express Company, but that under the Act creating said Circuit Court of Appeals said decision against petitioners is as to said Commissioners made final in their favor.

18. That your petitioners are advised and believe that said judgment of the United States Circuit Court of Appeals for the Fifth Circuit in said case is erroneous, and that this Honorable Court should require the said case to be certified to it for review and determination, under and in conformity with the provisions of the 6th section of the Act of Congress entitled

"An Act to establish Circuit Courts of Appeals, to define and reg-
"ulate in certain cases the jurisdiction of the Courts of the United
"States and for other purposes,"

approved March 3, 1891,—petitioners presenting this their petition for certiorari within one year from the rendition of the judgment of the said Circuit Court of Appeals and at the first term of this Court thereafter; accompanying the same with a certified copy of the entire record of said case in the Circuit Court of Appeals as required by rule 37 of this Honorable Court, said record being filed herewith as part of this application for certiorari.

19. That the questions involved in said suit are of gravity and important to the nation at large:

First. In having defined the power, if any, and the limits of the power, that State Administrative Boards have to determine who shall or who shall not pay a stamp duty lawfully imposed by the Congress of the United States, when under the Constitution the power was given Congress "to lay and collect" taxes, &c., said Circuit Court of Appeals having in effect held that the Georgia Railroad Commission had the power to determine who shall pay said stamp duty and to enforce the collection thereof by state statutory penalty suits.

Second. To the shipping public and the express companies throughout the United States, as to who is required by the said Act of Congress to pay the stamp duty on packages transported by express within the sev-

eral states comprising the United States, said Circuit Court of Appeals having confirmed an order that the express company only was required to pay.

Third. In having adjudicated, whether or not an excise duty, lawfully imposed by the Congress of the Unlted States, under the constitutional provision that all such "shall be uniform throughout the United States," can be held, in a case where a one-cent stamp on an express receipt is required by the company to be attached by the shipper,—

> "to manifectly discriminate, largely and unjustly, between the "shipper of a small package for a short distance at a low rate, and "the shipper of a larger package for a longer distance at a larger "rate."

That these matters affect the internal regulations of the country at large; the former, the relations between the general government and officers of the states: and petitioners charge that the decision of the said Circuit Court of Appeals as to the first question, is in conflict with the fundamental principles underlying the decisions of this Court in *McCullough* v. *The State of Maryland*, 4 Wheat., 316; *Weston* v. *City Council of Charleston*, 2 Pet., 449; *Crandall* v. *Nevada*, 6 Wall., 46, *Boske* v. *Comingore*, 177 U. S, 559, and *Knowlton* v. *Moore*, decided May 14, 1900.

And, as to the second and third questions, said decision conflicts with the plain intent of the said act of Congress itself, and with the cases of *Hubbell* v. *Crawford* and *American Express Co.* v. *Michigan*, decided April 16th, 1900, 177 U. S., 404, wherein this Court held, that conceding for the sake of argument that the stamp tax in question was imposed by Congress upon the express company, still the company had a right to pass the tax on to the shipper, and further that if reasonable rates existed at the time the stamp act was passed, they were not rendered unreasonable by adding thereto the stamp duty imposed thereby; and with the case of *Knowlton* v. *Moore*, decided May 14, 1900, wherein this Court construed the uniformity clause of the constitution relating to the progressive rate feature of the War Revenue act aforesaid.

20. That petitioners therefore respectfully submit, that the question of the legal and just construction of the said Act of Congress of June 13th, 1898, so far as it relates to the payment of stamps on express receipts, and who is finally bound to pay the same, and whether said Act of Congress makes this payment a part of the rate of carriage to be paid by the express company on local business in Georgia, as was determined by the Railroad Commission of Georgia, which Commission and said decision of the Circuit Court of Appeals denied to said company the right to contract with shippers for the payment of said stamp tax,—should be finally and authoritatively adjudged by this Court, if it has not already done so as petitioners contend, by the cases aforesaid.

21. Your petitioners therefore insist that the judgment rendered by the Circuit Court of Appeals of the Fifth District, is erroneous, and should be reversed for the following reasons:

1. Because it confirms an illegal order of the State Railroad Commission, a body created to regulate freight and passenger tariffs, which order expressly designates *who shall or who shall not pay the* constitutional stamp duty or tax levied by the Act of Congress, and further orders said tax to be paid in a manner contrary to the said act of Congress, when under the Constitution creating the Federal Government, neither the states, nor such a commission created by and existing under their laws, have the right or power so to designate as to who shall or shall not pay taxes levied and due to the General Government.

2. Because the Circuit Court of Appeals having determined—

> "that the issue between the Railroad Commission of Georgia and "the Southern Express Company was: Had that company the "right to add to the maximum charges prescribed by the Commis- "sion the cost of the one cent revenue stamp required by the Act "of Congress to be attached to a receipt issued in each case of "shipment;"

and that:

> "As the Act of Congress in question does not purport to fix or af- "fect the rates which carriers may charge for transportation,"

erred, when it held that the Railroad Commission of Georgia, a State administrative Board, had the power under the laws of Georgia to provide for the collection of and define who was to pay for the said Internal Revenue stamp or duty, laid by the Federal government on each shipment by express within the State of Georgia, had held that the express company should pay, and that the company could not contract with the shipper for its payment.

3. Because said Court also erred when it thus enlarged and extended the powers of said Commission, and reversed the Circuit Court, which had correctly held, 92 F. R., 715, that:

> "The question whether the war stamp tax imposed by the United "States upon the manifests and bills of lading of express com- "panies, shall be borne by the company or by shippers, *is not one* "*within the control* of the administrative officers of a particular "state, and an order of a State Railroad Commission requiring its "payment by the express companies is without jurisdiction and "void;"

and—

> "The statute of Georgia giving the Railroad Commission the "power to fix rates for transportation to be charged by express "companies, and imposing penalties for violation of their orders, "*cannot be extended by a construction* to include authority to order "an express company to pay the war stamp tax imposed by the

"United States without demanding its payment from shippers,
"subject to the same penalties for its violation, such tax having
"no relation to the charge for transportation."

4. Because the Circuit Court of Appeals, after having correctly construed the Act of Congress, as aforesaid, i. e., that it

"does not purport to fix or affect the rates which carriers might
"charge for transportation * * for the act of Congress
"neither prohibits nor authorizes such an increase of rates; neither
"expressly nor by implication does it contain any provision on
"that subject,"

nevertheless erred when it affirmed the action of said Railroad Commission, whereby said one-cent stamp or duty laid by the United States government on each shipment, was by said commission made a part of *the rate of carriage* for the express company in the state of Georgia; which act of the commission was held binding on the company, and that any effort made by the company to contract with or have the shipper pay said stamp would be an illegal increase of the rates of carriage fixed by the commission, and subject the company to heavy penalties. The error of the Court being :

(*a*). In affirming and making binding on the company the said ruling that this stamp duty was *a part of the rate of carriage*, when it had just decided the contrary, by holding that said Act of Congress did not "contain any provision" on the subject of rates; and particularly so when it affirmatively appeared that the rates of carriage fixed by the commission were the same now as they had been, before the passage of the said Revenue Law by Congress; and

(*b*) When it affirmatively appeared that the express company did not receive any part of this one-cent duty thus paid to the government; and

(*c*) That under the rates fixed by the Railroad Commission, said company was entitled to receive, say 25 cents for the carriage of a package from Augusta to Atlanta; but, that under the ruling of the Commission, and said Circuit Court of Appeals requiring the company to pay for said stamp, it would only receive 24 cents for the transportation of such a package—the extra cent being paid the government, and not received by the company—and thus, to the extent of one cent per package, the company was unjustly deprived of its property, and required to serve the public at too low a rate; and

(*d*) Because the Court of Appeals in effect held that, notwithstanding the decisions of this Court to the contrary, in the *Hubbell* and *Maynard* cases, *supra*, still the Southern Express Company could not contract with the shipper to pay for said stamp, when, both under the laws of Georgia and said act of Congress, it had the legal right to make such contract for carriage.

5. Because the Court erred when it held—

"That the increase which the carrier proposes to make, by adding

"the tax imposed by the war revenue act, does manifestly discrimi-
"nate, largely and unjustly, between the shipper of a small package
"for a short distance at a low price and a shipper of a larger
"package for the longer distance at the lower rate. Though each
"shipper is charged one cent, the relations of this charge to the
"service is unequal;"

the error of the Court being that it failed to discriminate between what was a rate of carriage for a given service, and what was a tax or excise duty imposed by the United States government upon a transaction called into existence by the voluntary act of a shipper, such tax or duty being by the federal Constitution required to be uniform throughout the United States; petitioners insisting, that, under the war revenue law, no duty is laid nor tax required to be paid, unless the sender of a package desires to make use of the transpartation facilities afforded by an express company, and that the Court erred in denying to said express company the right to contract with said shipper for the payment of this tax on the shipment, and in holding that this was an increase in rates, was unjust, and would discriminate between shippers as stated.

6. Because the Court erred when it held that the rates of the commission were not unreasonable and not too low when it required the express company to pay the stamp tax from the income it received from the maximum rates fixed by said commission, in addition to the other burdens put upon the company by law, petitioners contending that if such ruling is legal, the rates prescribed for the company are too low, and require it to serve the public, if not at a loss, at too low a sum for the property invested.

7. Because the Court erred when it held that there were no sufficient facts alleged in the bill to show that the rate prescribed by the Railroad Commissioners was unreasonable, it appearing from the allegations of the bill, paragraph 11, that the charges on the gross income of the express company were: 50 per cent to the railroad company for carriage; 45 per cent. for expenses, 2½ per cent. in taxes, a total of 95½ per cent., leaving a net income from the property invested of one 4½ per cent, which in itself would be materially reduced by the requirement of paying the stamp tax, which in the State of Georgia alone would amount to $42,000 on local business, and that if the order of the commission was enforced, the rates would be too low, and result in irreparable loss and damage to the company, and such rates would be unfair, unjust and unreasonable. Further, the Court erred in dismissing the bill for not avering what was its income from its *inter-state* business, when this business was not involved in the suit.

8. Because the Court erred when it ordered the bill dismissed, when there was no special demurrer pointing out the defects suggested by the Court in the bill, petitioners insisting that they should have had an opportunity to amend to meet these defects of which they had no notice,

the same having never been suggested in the Court below nor in Court of Appeals, but originated with the Court of Appeals itself.

9. Because the Court rendered a final decree June 1, 1900, dismissing the bill against all defendants.

WHEREFORE petitioners respectfully pray that a Writ of Certiorari may be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding the said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record, and all proceedings of the said Circuit Court of Appeals in said case therein, entitled The Railroad Commission of Georgia, Appellants, vs. W. B. Dinsmore, et al., Respondents, No. 820, to the end that the said case may be reviewed and determined by this Court, as provided by section 6 of the Act of Congress entitled—

"An Act to establish Circuit Court of Appeals and to define and "regulate in certain cases the jurisdiction of the Courts of the "United States, and for other purposes,"

approved March 3, 1891, or that your petitioners may have such other and further relief or remedy in the premises as to this Court may seem appropriate and in conformity to the said Act, and that the judgment of said Circuit Court of Appeals in said case and every part thereof, may be reversed by this Honorable Court.

And petitioners will ever pray.

WM. B. DINSMORE, et al,
By
FRANK H. MILLER, their Solicitor.

UNITED STATES OF AMERICA, SOUTHERN DISTRICT OF GEORGIA, NORTHEASTERN DIVISION.

Frank H. Miller, being duly sworn, says he is the original counsel for the petitioners above named, and as such had personal charge of the case in the foregoing petition mentioned in the Circuit Court of the United States for the northeastern division of the Southern district of Georgia, and also in the United States Circuit Court of Appeals, where the cause, owing to his sickness, was argued by his son, William K. Miller, Esq., on the last hearing, May 16, 1900; that he has read said petition, to which his name is subscribed as counsel, and that the facts therein stated are true to the best of his information and belief.

Sworn to and subscribed before me this 10th day of August, 1900.

FRANK H. MILLER.

W. C. WARDLAW, *Notary Public, R. C., Ga.*

I hereby certify that I have examined the foregoing petition and that, in my opinion, the same is well founded; that the cause is one in which the prayer of the petitioners should be granted by the Court.

FRANK H. MILLER, *Solicitor for Petitioners.*

August 10th, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 390.

WILLIAM B. DINSMORE AND OTHERS

vs.

THE RAILROAD COMMISSION OF THE STATE OF GEORGIA AND THE SOUTHERN EXPRESS COMPANY.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to Review and Reverse Decision of the Circuit Court of Appeals as Reported in 102 Federal Reporter, 794, Reversing Decision in the Court Below Reported 92 Federal Reporter, 714.

BRIEF OF FRANK H. MILLER FOR PETITIONERS.

STATEMENT OF THE CASE.

1. The Railroad Commission of the State of Georgia on the 11th of July, 1898, upon a *representation* that the Southern Express Company had since the act of Congress of June 13, 1898, exacted and continued to exact from shippers as a condition precedent to forwarding any goods tendered to it for transportation between points within the State of Georgia the payment of the special tax upon such shipments imposed by the said act, thus indirectly increasing the cost of transportation beyond the rate fixed therefor by the Commission, ordered the Company to appear July 18, 1898, to show cause why it should not be held to have violated the rules and regulations of the commission by the exactions of overcharges as aforesaid, and *why suit should not be instituted* against it in every case of such overcharges for the recovery of the penalty provided by law for such illegal act.

The Company appeared and denied all jurisdiction on the part of the Commissioners in the premises, who, (see Record 55) adopted the opinion of Commissioner Atkinson, that under the act of Congress the express company was required to furnish the stamp, and on August 2, 1898, ordered

and directed the said stamp tax to be furnished, attached, cancelled, and paid by the said Southern Express Company alone, and not by the shippers, in whole or in part. Petitioners notified the Company to contest the validity, legality and constitutionality of the action of the Commissioners and protect the shareholders by applying to a court of competent jurisdiction to determine the liability of the Company, and such further steps as were necessary to protect the rights of the shareholders.

The Company refused, because a failure to comply with the requirements of the order of the Commissioners of August 2, 1898, would subject it to litigation with the authorities of the State of Georgia and the said Railway Commission, and the Company would run the risk of incurring penalties under the laws of Georgia, and of so clouding its title to its corporate franchises and rights as to embarrass its action.

The Directors of the Company, however, directed a new application to be made to the Commission to be allowed to collect from the shipper in addition to the existing rates sanctioned by the Commission the amount of war revenue tax held by the said Commission to be payable by the Company, which application the Commission refused.

Notice of this refusal was given to the Complainants, stating it was deemed expedient to comply with the orders of the Railroad Commission in the premises and that the company was then observing the Georgia Railroad Commission's rates on inter state business, and was, as to such business, paying the amount of war revenue tax without charging the same to the shipper or endeavoring to collect the same from the shipper.

2. This bill was filed to enjoin the Company from continuing to make this payment, the Railroad Commission from ordering, and the Attorney-General from instituting any suit of any sort for the purpose of enforcing the provisions of the said order of the Railroad Commission.

The Bill alleged that the tax imposed by the said war revenue law of 1898, as required by the said order of the said railroad commission, would aggregate to the Southern Express Company in the State of Georgia, annually, the sum of forty-two thousand dollars ($42,000) or other large sum, and that the said railroad commission were without any authority under the constitution and the legislative acts of the State of Georgia or under the said act of Congress approved June 13, 1898, to require the payment of the said stamp tax by said company, upon and before issuing its receipts and bills of lading; petitioners averring, also, that the express company has to make its own arrangements with the railroads for the carrying of its freight on passenger trains; that the railroads cannot be compelled to do this for the express company, and there is no prescribed limit to their charges against the Southern Express Company, as they are not charges made against the public; that the contracts of the express company with the railroad companies are matters of negotiation, and the average charge of the railroads is 50 per cent. of the express company's gross receipts; that it costs the express company 43 per cent. of its receipts to do its business, and this, added to the average 50 per cent. which must be paid to the railroads,

makes the total cost to the express company 93 per cent. of its receipts. A considerable express business is done at a charge of 10 cents per package, and a very large proportion of its intrastate business is done at a charge of 25 cents per package. Take 93 per cent. from these charges and there is left a margin of seven-tenths of a cent on the 10-cent packages and one three-quarters of a cent on the 25-cent packages. If the express company is compelled to pay one cent each on the receipts, it loses three-tenths of a cent on every 10-cent package and makes only three-quarters of a cent on the 25-cent packages. This would materially reduce the very moderate profit of the business, and will so reduce the income of the company as to lessen any dividends payable to its shareholders, like petitioners. That under section nine of the act of the General Assembly of the State of Georgia, approved December 24, 1896, Public Laws 28—to levy and collect a tax for the support of the State government for the years 1897 and 1898—all persons or companies doing an express business and charging the public therefor in the State of Georgia were required to "pay 2½ per centum on their gross receipts," and all persons or the superintendent or general agent of each express company were required to make a quarterly return under oath, in the form therein prescribed, under a penalty of indictment, conviction, and punishment, pursuant to section 1039 of volume III of the Code of 1895, and a failure to pay the tax will subject such corporation to a forfeiture of its charter; that under the provisions of this act, in the imposition of this tax and the enforcement thereof, no deduction will be allowed for the expense the company is subjected to in complying with the said order of the railroad commission and in making payment itself of the stamp tax imposed by the said revenue act of Congress. In other words, the corporation will be paying a tax to the State upon the entire aggregate sum paid out for stamps, as required by the order of the railroad commission, which payment will come out of the gross income of the company.

3. That there is no reason to believe that there can be and will be an increase in the local and other State business of said company; that the cost of conducting said business has been fixed by years of experience, and the amounts now paid therefor are the lowest that can be obtained and adopted and by which the public can be satisfactorily served by said express company; that the charges fixed by said commissioners before the passage of the said revenue law were established so as to enable the company to live, operate, and pay a fair dividend or return to its owners for the money and property embarked in the said business, and that the order of the said commisioners requiring the payment by the said company of the said one cent stamp on all bills of lading and receipts that it issued for the business done was resolved upon by said commissioners illegally and arbitrarily, and will cause a large reduction in the income of the company; that the enforcement of this order will be unfair, unjust and unreasonable; that the rates of carriage now imposed require the said express company to carry many classes of freight at barely cost, and the expense incident to said ser-

vice will in future be materially increased by the stamp aforesaid; that the payments for said stamps thus required to be made as a part of the rates imposed on the express company, and under which it must do business, by the order of said commission, will result in irreparable damage and injury and will cause a diminution of income, as nearly as can be ascertained, of forty thousand dollars ($40,000) per annum and a loss to petitioners in a decreased value of their shares of ten thousand dollars or other large sum.

4. The Commissioners met the application for an injunction in the present suit by a demurrer with proof of the schedule of rates taken from their report to the executive. They demur generally because the allegations in the bill do not entitle complainants to any relief, and because there is no equity therein; and, for special cause of demurrer say complainants have an adequate remedy at law, exclusive jurisdiction being in the State Courts; comprises matter entirely within the jurisdiction and discretion of the Commissioners over which the Courts have no control, there being no denial of the constitutional rights of the complainants alleged by them for any gross abuse of discretion, and it is in effect a suit against the State without her consent, contrary to the Eleventh Amendment of the Constitution of the United States, the penalty suits being required to be brought in the name of the State and the sums recovered paid into the State's treasury.

5. Upon hearing the bill and demurrer the Court passed the following order:

"The above-stated cause having been duly assigned for hearing "on the application of temporary injunction, at Augusta, in said "District, on the 10th day of February, 1899, and the parties hav- "ing been fully heard on the bill and the demurrer thereto, and the "Court having taken time for advisement:

"It is now upon consideration ordered, adjudged and decreed, "That the prayer that the Southern Express Company be enjoined "from voluntarily paying the war stamp tax in question be and "the same is hereby denied. Ordered, adjudged and decreed fur- "ther, That the defendants, the Railroad Commission of Georgia "and each member thereof, to-wit: the individual defendants, "Leander N. Trammell, Thomas C. Crenshaw, Jr. and Spencer R. "Atkinson, be and the same are hereby enjoined from any and all "order, direction, action or legal steps instituting or tending to "institute, and from any and all proceedings for the recovery of the "penalties named in the statute of Georgia in that behalf to enforce "compliance with its said order against the Southern Express Com- "pany, its officers or agents as threatened in the order of said Com- "mission dated August 2, 1898, for the reason that said order is "null and void, and said commission has no jurisdiction to adjudge "and designate the party who shall pay said tax.

"Ordered further, That the cause proceed as usual in equity.

"March 7th, 1899. EMORY SPEER, U. S. Judge."

6. The Commission appealed. (See par. 14 of petition for Certiorari, Record p. 36.) The Complainants entered a cross-appeal, as the Court had decided that the duty of the Express Company "must of necessity be determined by the construction of the United States law;" and complained that no injunction was ordered against the Express Company (Record p. 40.) The Circuit Court of Appeals reversed Judge Speer and ordered the bill dismissed by a divided Court by Judges McCormick and Pardee (Record pp. 57-61.) Judge Shelby dissented (See his opinion), (Record p. 61.)

ASSIGNMENTS OF ERROR.

Petitioners insist that the judgment rendered by the Circuit Court of Appeals of the Fifth District, is erroneous, and should be reversed for the following reasons:

1. Because it confirms an illegal order of the State Railroad Commission, a body created to regulate freight and passenger tariffs, which order expressly designates *who shall or who shall not pay the* constitutional stamp duty or tax levied by the Act of Congress, and further orders said tax to be paid in a manner contrary to the said act of Congress, when under the Contitution creating the Federal Government, neither the states, nor such a commission created by and existing under their laws, have the right or power so to designate as to who shall or shall not pay taxes levied and due to the General Government.

2. Because the Circuit Court of Appeals having determined—

> "that the issue between the Railroad Commission of Georgia and "the Southern Express Company was: Had that company the "right to add to the maximum charges prescribed by the Commis- "sion the cost of the one cent revenue stamp required by the Act "of Congress to be attached to a receipt issued in each case of "shipment;"

and that:

> "As the Act of Congress in question does not purport to fix or "affect the rates which carriers may charge for transportation,"

erred, when it held that the Railroad Commission of Georgia, a State administrative Board, had the power under the laws of Georgia to provide for the collection of and define who was to pay for the said Internal Revenue stamp or duty, laid by the Federal government on each shipment by express within the State of Georgia, had held that the express company should pay, and that the company could not contract with the shipper for its payment.

3. Because said Court also erred when it thus enlarged and extended the powers of said Commission, and reversed the Circuit Court, which had correctly held, 92 F. R., 715, that:

> "The question whether the war stamp tax imposed by the United "States upon the manifests and bills of lading of express com-

"panies, shall be borne by the company or by shippers, *is not one* "*within the control* of the administrative officers of a particular "state, and an order of a State Railroad Commission requiring its "payment by the express companies is without jurisdiction and "void;"

and—

"The statute of Georgia giving the Railroad Commission the "power to fix rates for transportation to be charged by express "companies, and imposing penalties for violation of their orders, "*cannot be extended by a construction* to include authority to order "an express company to pay the war stamp tax imposed by the "United States without demanding its payment from shippers, "subject to the same penalties for its violation, such tax having "no relation to the charge for transportation."

4. Because the Circuit Court of Appeals, after having correctly constructed the Act of Congress, as aforesaid, i. e., that it

"does not purport to fix or affect the rates which carriers might "charge for transportation * * for the act of Congress "neither prohibits nor authorizes such an increase of rates; neither "expressly nor by implication does it contain any provision on "that subject,"

nevertheless erred when it affirmed the action of said Railroad Commission, whereby said one-cent stamp or duty laid by the United States government on each shipment, was by said commission made a part of *the rate of carriage* for the express company in the state of Georgia; which act of the commission was held binding on the company, and that any effort made by the company to contract with or have the shipper pay said stamp would be an illegal increase of the rates of carriage fixed by the commission, and subject the company to heavy penalties. The error of the Court being:

(*a*) In affirming and making binding on the company the said ruling that this stamp duty was *a part of the rate of carriage*, when it had just decided the contrary, by holding that said Act of Congress did not "contain any provision" on the subject of rates; and particularly so when it affirmatively appeared that the rates of carriage fixed by the commission were the same now as they had been, before the passage of the said Revenue Law by Congress; and

(*b*) When it affirmatively appeared that the express company did not receive any part of this one-cent duty thus paid to the government; and

(*c*) That under the rates fixed by the Railroad Commission, said company was entitled to receive, say 25 cents for the carriage of a package from Augusta to Atlanta; but, that under the ruling of the Commission, and said Circuit Court of Appeals requiring the company to pay for said stamp, it would only receive 24 cents for the transportation of such a package—the extra cent being paid the government, and not received by the company—and thus, to the extent of one cent per

package, the company was unjustly deprivsd of its property, and required to serve the public at too low a rate; and

(*d*) Because the Court of Appeals in effect held that, notwithstanding the decisions of this Court to the contrary, in the *Hubbell* and *Maynard* cases, *supra*, still the Southern Express Company could not contract with the shipper to pay for said stamp, when, both under the laws of Georgia and said Act of Congress, it had the legal right to make such contract for carriage.

5. Because the Court erred when it held—

"That the increase which the carrier proposes to make, by adding "the tax imposed by the war revenue act, does manifestly discrimi- "nate, largely and unjustly, between the shipper of a small package "for a short distance at a low price and a shipper of a larger "package for the longer distance at the lower rate. Though each "shipper is charged one cent, the relations of this charge to the "service is unequal;"

the error of the Court being that it failed to discriminate between what was a rate of carriage for a given service, and what was a tax or excise duty imposed by the United States government upon a transaction called into existence by the voluntary act of a shipper, such tax or duty being by the federal Constitution required to be uniform throughout the United States; petitioners insisting, that, under the war revenue law, no duty is laid nor tax required to be paid unless the sender of a package desires to make use of the transportation facilities afforded by an express company, and that the Court erred in denying to said express company the right to contract with said shipper for the payment of this tax on the shipment, and in holding that this was an increase in rates, was unjust, and would discriminate between shippers as stated.

6. Because the Court erred when it held that the rates of the commission were not unreasonable and not too low when it required the express company to pay the stamp tax from the income it received from the maximum rates fixed by said commission, in addition to the other burdens put upon the company by law, petitioners contending that if such ruling is legal, the rates prescribed for the company are too low, and require it to serve the public, if not at a loss, at too low a sum for the property invested.

7. Because the Court erred when it held that there were no sufficient facts alleged in the bill to show that the rate prescribed by the Railroad Commissioners was unreasonable, it appearing from the allegations of the bill, paragraph 11, that the charges on the gross income of the express company were: 50 per cent. to the railroad company for carriage; 45 per cent. for expenses, 2½ per cent. in taxes, a total of 95½ per cent., leaving a net income from the property invested of one 4½ per cent, which in itself would be materially reduced by the requirement of paying the stamp tax, which in the State of Georgia alone

would amount to $42,000 on local business, and that if the order of the commission was enforced, the rates would be too low, and result in irreparable loss and damage to the company, and such rates would be unfair, unjust and unreasonable. Further, the Court erred in dismissing the bill for not avering what was its income from its *inter-state* business, when this business was not involved in the suit.

8. Because the Court erred when it ordered the bill dismissed, when there was no special demurrer pointing out the defects suggested by the Court in the bill, petitioners insisting that they should have had an opportunity to amend to meet these defects of which they had no notice, the same having never been suggested in the Court below nor in Court of Appeals, but originated with the Court of Appeals itself.

9. Because the Court rendered a final decree June 1, 1900, dismissing the bill against all defendants.

BRIEF OF THE ARGUMENT.

1. The jurisdiction of the Circuit Court in this suit was, as against the Railroad Commission of Georgia, based on the fact, that they were citizens of a different State from complainants, one citizens of Georgia and the others of New York. This as against the Commission and their acting outside of the sphere of their duties, did not necessitate a construction of the War Revenue Act, but as against the Express Company and its paying for stamps under the order of the Commission, its construction was involved. The decision of the Circuit Court of Appleas was final as to the Railroad Commission.

This is an application to this Court to review, "by certiorari or otherwise," a case finally determined in the Circuit Court of Appeals, Fifth Circuit. This power given by the Act creating the Circuit Court of Appeals has been frequently exercised. In a recent case this Court said:

> "That while this power is co-extensive with all possible necessities and "sufficient to secure in this Court a final control over litigation in all the "Courts of Appeals, it is a power which will be sparingly exercised, and "only when the circumstances of the case satisfy us that the importance "of the questions involved, the necessity of avoiding a conflict between "two or more Courts of Appeal or between Courts of Appeal and the "courts of a State, or some other matters affecting the interests of this "nation in its internal or external relations demands such exercise." *Forsythe vs. Hammond*, 166 U. S., 166, 514.

The application for certiorari comes under this ruling. Petition Paragraphs 19 and 20 are as follows:

> "19. That the questions involved in said suit are of gravity and "importance to the nation at large:
>
> "*First.* In having defined the power, if any, and the limits of "the power, that state administrative boards have to determine who

"shall or who shall not pay, a stamp duty lawfully imposed by the "Congress of the United States, when under the Constitution the "power was given Congress 'to lay and collect' taxes, etc., said "Circuit Court of Appeals having in effect held that the Georgia "Railroad Commission had the power to determine who shall pay "said stamp duty, and to enforce the collection thereof by State "statutory penalty suits.

"*Second.* To the shipping public and the express companies "throughout the United States, as to who is required by the said "Act of Congress to pay the stamp duty on packages transported "by express within the several states comprising the United States, "said Circuit Court of Appeals having confirmed an order that the "express company only was required to pay.

"*Third.* In having adjudicated, whether or not an excise duty, "lawfully imposed by the Congress of the United States, under the "constitutional provision that all such 'shall be uniform through-"out the United States,' can be held, in a case where a one-cent "stamp on an express receipt is required by the company to be "attached to the shipper: 'To manifestly discriminate, largely and "'unjustly, between the shipper of a small package for a short "'distance at a low rate and the shipper of a larger package the "'longer distance at the larger rate.'

"These matters affect the internal regulations of the country at "large; the former, the relations between the general government "and officers of the states; and petitioners charge that the decision "of the said Circuit Court of Appeals as to the first question is in "conflict with the fundamental principles underlying the decisions "of this Court in *McCullough* v. *The State of Maryland*, 4 Wheat., "316; *Weston* v. *City Council of Charleston*, 2 Pet., 449; *Crandall* "v. *Nevada*, 5 Wall., 46; and *Knowlton* v. *Moore*, decided May 14, "1900; in the former of which, this Court, speaking of Chief Jus-"tice Marshall, said:

> "The States have no power by taxation or otherwise, to retard, "impede, burden or in any manner control the operation of the "constitutional laws enacted by Congress to carry into execution "the powers vested in the general government."

"And as to the second and third questions, said decision con-"flicts with the plain intent of the said Act of Congress itself, and "with the cases of *Hubbell* v. *Crawford* and *American Express Co.* "v. *Maynard*, decided by this Court April 16, 1900, wherein the "Court held, that conceding for the sake of argument that the "stamp tax in question was imposed by Congress upon the express "company, still the company had a right to pass the tax on to the "shipper, and further that if reasonable rates existed at the time "the stamp act was passed, they were not rendered unreasonable "by adding thereto the stamp duty imposed thereby; and with the

"case of *Knowlton* v. *Moore*, decided May 14, 1900, wherein this "Court construed the uniformity clause of the Constitution, re- "lating to the progressive rate feature of the War Revenue Act "aforesaid.

"20. That petitioners respectfully submit, that the question of "the legal and just construction of the said Act of Congress of "June 13, 1898, so far as it relates to the payment of stamps on "express receipts, and who is finally bound to pay the same, and "whether said act of Congress makes this payment a part of the "rate of carriage to be paid by the express company on local busi- "ness in Georgia, as was determined by the Railroad Commission "of Georgia, which Commission and said decision of the Circuit "Court of Appeals denied to said company the right to contract "with shippers for the payment of said stamp tax, should be finally "and authoritatively adjudged by this Court, if it has not already "done so, as petitioners contend, by the cases aforesaid."

Apart from these matters of law, there are five other states, besides Georgia, viz.: North Carolina, South Carolina, Mississippi, Florida and Arkansas, which have state railroad commissions. Those of North Carolina and South Carolina have issued substantially the same order as in Georgia, requiring the express company alone to pay the revenue tax. So that the importance of the questions at issue and their early final adjudication cannot be overestimated, not only in the territory of the Southern Express Company, but in other states which have established Railroad Commissions, namely: Ohio, Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Wisconsin, New York, North Dakota, Kansas and Nebraska.

THE STATUTORY POWERS OF THE RAILROAD COMMISSION OF GEORGIA.

2. By the Act of 1879, P. L. 125, it was enacted that three commissioners be appointed by the Governor of the State of Georgia, with the consent of the Senate, that should be known as the Railroad Commission. They were given power to prevent extortion by railroads and unjust discrimination, and were charged with the duty to make "reasonable and just rates of freight and passenger tariff to be observed by all railroad companies doing business in this State or on the railroads thereof"; to make just rules and regulations as to handling and delivering freight; were required to make schedules of just and reasonable charges for the transportation of freight and passengers and to publish their rates. Any railroad company found guilty of violating these regulations was subject to very heavy statutory penalties. Fines of $1,000 to $5,000 for each offense, revocation of charter, &c., &c.

All of said laws are now grouped together in the Code of Georgia of 1895, section 2185, 2218; and in the Code of 1882, they are sections 719 (a), et seq.

See *supra*, pages 21 to end.

By the Act of October 21, 1891, P. L. 151, new Sec. 2217, Code 1895, the powers of the Railroad Commission were extended "so as to give them power and authority to regulate charges by express companies *for transportation* from point to point in Georgia."

POWER CONSTRUED.

These powers of the Commission have received judicial construction by the Supreme Court of Georgia.

So far as they bear upon the questions involved in this record, they are as follows:

In *Smith* v. *Ga. R. R.*, Decided Feb. 27, 1883, 70 Ga., 694, the constitutionality of the act creating the Commission was upheld, and on page 704, the Court say:

> "It may not be out of place, in concluding this opinion, to say "that, whilst we hold the act of October 14th, 1879, constitutional, "and the orders of the Commissioners valid and binding, yet we are "not to be understood as holding that their powers *are unlimited or "beyond legal control by the proper authorities of the State.* On the "contrary, we hold that the powers which have been conferred upon "them are to be exercised within legal and constitutional limita- "tions, *and in such way as not to invade the legal and constitutional "rights of others.* If, therefore, the case made by the complainant "against the Commissioners had shown a violation of the chartered "rights of the Company, it would have been the duty of the court, "by proper order and decree, to have restrained and enjoined them "from such violation."

This case was brought to this Court and is reported 128 U. S., 174, where the decision of the Supreme Court of Georgia was affirmed, and the powers of the Commission are held to be to provide reasonable regulations for the transportation of freight and passengers over railroads within the limits of the State and to prevent unjust rates and discriminations. (Page 178.)

Subsequently the Commission asserted the power to compel one railroad *to make a contract* with another railroad for a through bill of lading. Upon the railroad declining to comply with the order of the Commission, it was sued for the statutory penalty. In this case, *The State* v. *Wrightsville & Tennille R. R.*, decided June 7, 1898, reported 104 Ga. R., 407, the Court denied any power in the Commission as claimed, and said, page 442,

> "We are clearly of the opinion that the act of 1874 was not in- "tended by the Legislature to compel a railroad company to make "a contract against its will. * * The *voluntary act* of one "party in making a contract is quite different from the *involuntary "act* of the same party in making a like contract under duress or "compulsion. As before remarked, the voluntary act of issuing a

"through bill of lading over the Central of Georgia Railway Co.,
"cannot be construed into an act of discrimination against the Au-
"gusta Southern Railroad, there being no complaint of any differ-
"ence in rates or any refusal to deliver freight to the connecting
"roads or transfer cars, or things of that short."

On page 894 the Court say further,

"The Attorney-General relies upon the words, 'Shall make such
" 'just and reasonable rules and regulations as may be necessary for
" 'preventing unjust discrimination in the transportation of freight
" 'and passengers.' These words read in connection with the con-
"text and of the title of the act clearly mean that the commission
"should have power to prevent unjust discriminations in the rates
"and charges and to make rules for this purpose. As we have
"shown above that issuing a through bill of lading over a con-
"necting road and refusing to issue it over another is not an unjust
"discrimination within the meaning of the words used in the act.
"These words cannot be construed into meaning that the commis-
"sion can adopt rules *compelling* the railroad to issue through bills
"of lading over another road."

It will thus be seen that the commission is subject to the judical power and has *no power* to control the contractual relations of any corporation, other than the fixing of rates of transportation.

ASSIGNMENTS OF ERROR 1, 2, 3 AND 4.

3. The Commission has no existence outside of the statutory power delegated to it. This power is in derogation of common right, and will be strictly construed. The Commission has no power to *collect taxes* for the State of Georgia, or determine who is to pay them, and it certainly has none to collect those of the United states, nor to provide as to who shall pay them. What it cannot do at home it cannot do abroad. All State taxes in Georgia are levied and collected through State officers—tax receivers, collectors, etc. The only authority that the Commission has is to regulate freight and passenger tariffs, as to railroads, and, as far as express companies are concerned,

"to regulate the prices to be charged by any company * *
"for any service performed by such company."

It has no other power whatever over the company. It cannot control the internal management of the company, nor provide what insurance it shall carry upon its property, nor what taxes it shall pay thereon—but only for "service performed." It can provide that the charges of the company for transportation shall be reasonable and just. It cannot compel the company to make a contract, nor deny it the right to make an *express contract* for carriage, particularly if it does not increase the rate. In Georgia by statute a carrier can make such contract.

By Civil Code, §2276:

"A common carrier cannot limit his legal liability by any notice

"given, either by publication or by entry on receipts or tickets "sold. *He may make an express contract*, and will then be gov- "erned thereby."

The Commission proceeded erroneously to take upon itself the construction and enforcement of the Act of Congress. It concluded that the law placed the payment of the War Stamp Tax solely on the express company. It therefore ordered it to pay the Stamp Tax on receipts, and *not to contract with the shipper* to pay therefor.

It thus denied not only the right of the Express Company to make a special contract for carriage, a right that existed by statute and common law, but also erroneously construed the Act of Congress in arriving at this conclusion.

In *American Express Co.* v. *Michigan*, 177 U. S., 404, this Court held: That the act does not forbid an express company "from requiring "the shipper to furnish the stamp or the means of paying for it."

Judge Speer correctly held—before this decision was announced—that: "The revenue exaction *is no part of a rate* for the shipment of express matter." Suppose the company had refused to be bound by the order of the Commission requiring it to put on and pay for the stamps. Numerous suits would have been brought to enforce the State statutory penalties and to forfeit the charter, and that, because the express company failed to obey an erroneous construction of a Federal statute, which did not have this penalty. The power of the Commission, is, as stated to fix "the prices for any service performed." How can the payment or non-payment of a tax due the General Government be any part of a "service performed" for express transportation in the State of Georgia? It is an excise duty due to the Government on business done, but it is not a "service performed" for the Government.

Even the Government itself, acting through G. W. Wilson, Commissioner of Internal Revenue, in circular No. 570, defines the duties of carriers with respect to issuing of stamped receipts under the war revenue act, and said, as far as applicable here, as follows:

"In the case of the *American Express Company* v. *Fred A. May-* "*nard*, the United States Supreme Court has held, in an opinion "filed April 16, 1900, (Treasury Decisions, Vol. 3, No. 17, Int. "Rev. No. 100), in construing the above provision, that the ex- "press company is not forbidden from shifting the burden of the "stamp tax by an increase of rates which are not in themselves "unreasonable.

"The Court did not hold that it was not the duty of the express "company to give a duly stamped receipt to the shipper for each "shipment, but that the tax might be shifted by an increased "charge for transportation within the limits of what is reasonable.

"In conformity with the foregoing opinion the following rulings "are promulgated for the guidance of all concerned :

"(1) The obligation of every carrier receiving goods for "domestic transportation to issue a stamped receipt therefor, with "the stamp duly canceled, is absolute and without exception, "under a penalty, for failure, of fifty dollars for each offense. "The Commissioner of Internal-Revenue has no jurisdiction what- "ever in the matter of the increased rate which the Supreme Court "states the carrier may charge the shipper for the purpose of "indemnifying himself for the stamp tax, except in the case of "goods transported for the United States.

"(2) Where officers of the United States ship goods by carrier, "and the carrier has no existing contract with the United States, "whereby the said goods are to be carried at a fixed rate, the "stamped receipt must be issued to the officer by the carrier, and "the officer may pay an additional rate, not exceeding 1 cent for "any one shipment, and it will be allowed in his accounts."

It is therefore confidently insisted, that the action of the Georgia Commission is entirely outside of the scope of its powers, both as to the express company and the General Government. The opinion of Judge Speer, Record pp. 29-35, and the dissenting opinion of Judge Shelby, Record p. 61, contain the true view of the law. The Constitution of the United States gives power to Congress "to lay and collect taxes," and such can only be collected in the way pointed out by Congress. No power is given a State or its Railroad Commission, or other State officers, under the war revenue act or any other act, to in any way provide for the collection of such taxes, and their interference would in many instances, as in this, have the effect to retard, impede and control the operation of the constitutional laws enacted by Congress, which is contrary to all State authority. *McCullough* v. *Maryland*, 4 Wheaton, 316. *Weston* v. *City of Charleston*, 2 Peters, 449; Cooley on Taxation, 2nd ed., 83.

In *McCullough* v. *Maryland*, Chief-Justice Marshal (4 Wheat., 424,) after declaring the suprememacy of the National Government in all matters within the sphere of its operations and that it had the power to raise revenue for national purposes, page 409, said, page 424:

"No trace is to be found in the Constitution of an intention to create "a dependence of the government of the Union on those of the "States, for the execution of the great powers assigned it. Its means "are adequate to its ends; and on those alone was it expected to "rely for the accomplishment of it ends. To impose on it the "necessity of resorting to means which it cannot control, *which* "*another government may furnish or withhold*, would render its "course precarious, the result of its measures uncertain and create "a dependence on other governments which might disappoint its "most important designs and is incompatible with the language of "the Constitution." 4 Wheaton, 424.

In *Boske* v. *Comingore*, 177 U. S., 460; the latter was a United States Internal Collector in Kentucky and for refusing to produce in a State Court documents of file in his office, was adjudged in contempt and sent to jail. Subsequently the United States Court, 96 Feb. R. 552, denied the right of the State Court to so act, and discharged him from custody, holding that his imprisonment was in violation of the Constitution and laws of the United States. In the opinion Judge Evans says, 96 Fed. 560:

> "The United States has complete revenue system of its own, and
> " equally so has the State. They are, and must necessarily be,
> "entirely independent of each other."

On appeal this decision was affiirmed. 177 U. S. 467.

If such action of the State Commission is allowed to be unchecked, it would simply be an entering wedge to further encroachment by State officers upon the exclusive right of the Federal Government, which are wholly exempt from any such interference. The right of the States or their officers to so interfere has been denied from the foundation of the Government, and it is necessary, for its maintenanace and preservation, that this should continue.

The Commission said—and the Circuit Court of Appeal has affirmed it, that the Express Company alone shall pay this tax, and that the shipper shall not. When on the contrary this Court has said that the Company may not pay the tax, but that it may contract with the shipper to so do. *Am. Ex. Co.* v. *Michigan*, 177 U. S. 404. Which shall prevail? Assuredly the latter.

The Circuit Court of Appeals therefore erred in affirming the order of the Commission.

ASSIGNMENTS OF ERROR 5, 6, AND 7.

The Circuit Court of Appeals, by two of its Judges, held that the addition of the one-cent stamp on express receipts which the company desired to contract with the shipper to be paid by the shipper, would

> "manifestly discriminate, largely and unjustly, between the
> "shipper of a small package for a short distadce at a low rate and
> "a shipper of a larger package for the longer distance at the larger
> "rate."

This ruling is contrary to the decision of this Court, in *American Express Co. vs. Michigan*, 177 U. S. Reports, 404, where this Court said, page 408 :

> "We do not however understand the remarks on this subject as
> "implying that the Court below decided that the rate as increased
> "by the one-cent was intrinsically unreasonable without regard to
> "the provisions of the act of Congress, but only that the rate as so

"increased was unreasonable, because an attempt on the part of the "express company to shift the burden of the tax imposed upon it "by the act of Congress, and hence was by legal inference forbid- "den by that act."

Again:

"As there was no allegation that the rates existing prior to the "imposition of the one-cent stamp tax were unreasonable, it would "follow that the rates which were otherwise reasonable were "decided not to be so solely because there was added to the charge "for each package the exact amount of the increased cost for "transporting the package, occasioned as to each package, by the "specific imposition on each by the act of Congress of the one-cent "stamp tax. But to cause rates which were conceded to be rea- "sonable, *to become unreasonable, because alone of such increased "charge*, the assumption must be made, that the act of Congress, "not only imposed the burden of the tax solely on the express "company, but also forbade its shifting the same by any and every "method."

Page 414:

"Nor is the fact that the express company is a common carrier "engaged in a business in which the public has an interest and "which is subject to regulations, of importance in determining the "correctness of the proposition relied upon. The mere fact that "the stamp duty is imposed upon a common carrier does not divest "such tax of one of its usual characteristics or justly imply that "the carrier is in consequence of the law deprived of its lawful "right to fix reasonable rates. * * * As previously "pointed out, to decide as a matter of law that rates are essentially "unreasonable, from the mere fact that their enforcement will op- "erate to shift the burden of a stamp tax, would be in effect but "to hold, that the Act of Congress by the mere fact of imposing a "stamp tax forbids all attemps to shift it, and consequently that "the carrier is deprived by the law of the right to fix rates, even "although the limit of reasonable rates be not transcended. This "reduces the contention back to the unsound proposition which we "have already examined and disposed of."

The carrier is not called upon to answer a charge of discrimination against a shipper for what he voluntarily does, nor can there be any discrimination charged against a carrier in contracting for the payment of a constitutional tax, nor where the constitution provides that such tax shall be "*uniform throughout the United States.*" The stamp on a letter going a short or long distance, is 2 cents, and is uniform throughout the United States. A stamp on an express receipts, whether given for a package to be carried a long or a short distance, is one cent and is

uniform throughout the United States. The Government charges for stamps in each case. The Express Company gets no part of the one cent—it is no part of the rate. The Circuit Court of Appeals confounded an excise tax duty, imposed by the Federal Government, and due to it upon a voluntary transaction entered into by a shipper with an express company, for the carriage of goods—with what was a reasonable rate to be paid the carrier for the carriage of the goods. The Court overlooked constitutional requirement that all such excise duties "shall be uniform throughout the United States," that is, geographically. *Knolton* v. *Moore*, May 14, 1900. Even it operates unequally. *Ib.*

Such a duty or stamp tax is no part of a rate of carriage for a "service performed" by the Company. Such stamp tax is really an expense to the person using the facilities taxed. A letter—the property of the sender—may be forwarded to its destination by mail or by hand. If sent by mail, a stamp of two cents must be placed thereon, whether the letter is to go a short distance or a long distance. This payment to the General Government is for the facilities afforded by the mail—protection against loss of property, quick carriage, etc. So, also as to express matter—a package may be sent by express or by hand. The facilities and protection afforded by the express company are similar to the facilities and protection afforded by the carriers of the United States mail. The package—the property of the sender—is quickly and safely carried. There is no tax laid by the revenue act upon the express company, *until* there is something carried by express, and then on the transaction of shipment. Therefore, before the shipper by express causes the exercise of these transportation facilities, and raises the necessity for the payment of the tax, he, as in the case of the sender of a letter by mail, should pay the stamp tax on the transaction he originates.

The Court erred therefore when held as matter of law, and without any evidence, that the one-cent charge would discriminate against a sender of a small package for a short distance as against the sender of a large package for a longer distance.

Again. The Circuit Court of Appeals, while recognizing the construction given the act of Congress by this Court in the case of *American Express Co.* v. *Michigan*, 177 U. S. 404, misapplied the same. The majority of the Court said that the War Revenue act,

> "does not purport to fix or affect the rates which carriers might "charge for transportation, for the act of Congress neither prohibits "nor authorizes such an increase of rate; neither expressly nor by "implication does it contain any provision on the subject"—

and yet it held that if the shipper was required to pay this tax it would be unjust in the instance given, notwithstanding the fact that this Court had in the case above-mentioned decided that it was the right of the express company to contract with the shipper as to the payment of said tax, and that if the rstes existing before the imposition of the one cent tax were reasonable, that they would not become unreasonable by the imposition upon the shipper of the tax above-stated. To make this act of the carrier unreasonable the act of Congress must have put the tax

solely on the express company and forbade it from shifting the same by any method to the shipper. *Express Co.* v. *Michigan* 177 U. S. 414. This Court held in that case that this the act did not do, there it was shown that the Express Company had a right to contract with the shipper for the payment of the stamp, even if the tax was laid primarily upon the company.

It is now insisted that the tax *is not primarily laid upon the express company*. The act of Congress lays the tax on the party

"who shall make, sign or issue the same (the receipt,) or *for "whose use or benefit* the same shall be made, signed, or issued."

Who is the person to be benefitted by making and issuing of the receipt? It is unquestionably the shipper. In making a shipment a shipper delivers his property in the hands of the express company for transportation. If he receives no receipt therefor,—which, by the way, it is and has always been the custom of the express business to issue, irrespective of any act of Congress—he would have nothing to show that the company had received his property or was liable for its value in case of loss. So that the making and issuing of the receipts is for the "benefit" of the shipper. As the shipper by express need not resort to this method of transporting his property, as he can send it by a special messenger or a traveling friend, it is unquestionably for the "use" and "benefit" of the shipper, that a receipt is required to be issued, stamped and cancelled. The shipper is the person benefitted, because he alone would have posession of the receipt to produce in court, in case of a suit against the company for loss or damage of his property. The receipt is entirely for his protection, and to be legal, must be stamped, and as the last expression of the law-making power is, that the stamp shall be placed upon the document by the person for whose benefit the same is made, signed, or issued, the law unquestionably places the legal duty of affixing the stamp upon the shipper.

It is to be borne in mind that the express company pays taxes in every State upon its property there located, and towards the public it occupies the position of one awaiting employment. The Government practically says to the public,

> If you employ that means of transportation a stamp must be paid by the person for whose benefit it is done.

It is, therefore, a proper construction of the law to hold that this duty is primarily laid upon the shipper.

In construing this very act of Congress, the Court in *Knowlton* v. *Moore*, decided May 14th, 1900, said:

> "We are therfore bound to give heed to the rule, that where a par-
> "ticular construction of a statute would occasion great inconven-
> "ience, or produce inequality and injustice, that view is to be
> "avoided if another and more reasonable interpretation is present
> "in the statute."

There is present in the statute a question as to whether the tax is pri-

marily laid upon the express company or the shipper. To put it entirely upon the company, as is shown in this case, involves the loss of $42,000 a year in the State of Georgia alone. It could not have been the intention of Congress to tax this company to that extent on its Georgia business. How much fairer it would be to require the tax to be paid by the man who had bought or hired for the transportation of his property, the facilities of the express company. No injustice is done the shipper thereby, and great inequality in taxation and injustice to the express company is avoided. We therefore insist that the tax, by act of Congress, is primarily laid upon the shipper, apart from the right of the express company to contract with the shipper for the payment of the tax.

ASSIGNMENTS OF ERROR 8 AND 9.

The majority of the Court of appeals ordered the bill dismissed; and as a reason said (record 59):

> "There is no statement whatever of amount of income of the com-
> "pany from its Georgia bussness (intra-state business,) nor from
> "its business (interstate business), nor from both together, either
> "gross income or net income or profits of the company."

It is insisted that this is not a fair statement of the case particularly when there was no special demurrer on this ground. The bill showed that out of every dollar of gross income received by the Company from its Georgia business, it cost the express company 93c. to do business: 50 cents went to the railroad for carrying express matter, 43 cents for its expenses. This only left 7 cents as income which was further reduced by 2½ per cent. state taxes on the gross income, which left a net income of only 4½ per cent, and this 4½ per cent. would be further reduced by $42,000 a year if the company was required to pay for the stamp on express receipts.

This would show of itself that the rates were unreasonable—that not a sufficient profit was allowed to be made out of the money invested in the company. If the amount of the capital of the company was alleged, and which could easily have been done by amendment if opportunity had been given, the whole amount of its income and the whole amount of its net profits from all sources whatever, the only way the Court could arrive at the fairness of the rates was to show what *per cent.* of profits resulted. The bill simply saved the Court this labor, by alleging what was the ultimate result. The idea that there should have been an allegation as to what was the net profits of interstate business we submit is unsound. The questions only involved the intra-state business, and what was received from interstate business could cut no figure in the transaction.

The majority of the Court of Appeals in holding the bill defective for failing to state the income divided from inter-state business overlooked the decision of in *Smyth* v. *Ames*, 169 U. S. 467, where this Court say, p 541:

> "In our judgement, it must be held that the reasonableness or "unreasonableness of rates prescribed by a State for the transporta- "tion of persons and property wholly within it limits *must be deter- "mined without reference to the interstate business* done by the carrier, "*or to the profits derived from it.* The State cannot justify unrea- "sonably low rates for domestic transportation, considered alone, "upon the ground that the carrier is earning large profiits on its "inter-state business, over which, so far as rates are concerned, the "State has no control. Nor can the carrier justify unreasonably "high rates on domestic business upon the ground that it will be "able only in that way to meet losses on its interstate business. So "far as rates of transportation are concerned, domestic business "should not be made to bear the losses on interstate busines, nor "the latter the losses on domestic business. It is only rates for the "transportation of persons and property between points within the "State that the State can prescribe; and when it undertakes to pre- "scribe rates not to be exceeded by the carrier, it must do so with "reference exclusively to what is just and reasonable, as between "the carrier and the public, in respect of domestic business."

The Circuit Court of Appeals, Record 58, also said:

> "It is true, but wholly immaterial, that the commissioners held "and expressed the view that the war revenue act imposes the tax "in question exclusively upon the carrier and precludes it from "relieving itself of the expense of affixing and cancelling the stamp "required to be attached to each bill of lading, manifest, or other "evidence of receipt, by passing that expense on to the shipper "and requiring him to submit to an increased rate to that extent. "This construction is unsound, but as we have just said, wholly "immaterial, for the Act of Congress neither prohibits nor author- "izes such an increase of rates." * * The laws of Georgia and "requirements of the Railroad Commission in pursuance thereof "and in accord therewith, while the limitations of the fourteenth "amendment of the Constitution of the United States are observed, "not only affect but control this carrier as to its Georgia business "and prohibit it from increasing its charges beyond the maximum "rates prescribed by the Commission."

No laws of Georgia are set out except the authority to regulate rates. The Code of Georgia, section 2276, authorizes the carrier to make an express contract. This Court say the stamp duty is an indirect tax, capable of being shifted, and in the same case, 177 U. S. Reports, 418, decided that the Court below erred in holding that by the Act of Congress the express company was forbidden from shifting the

burden of the stamp tax by an increase of rates which were not in themselves unreasonable.

The rates in Georgia before the passage of the War Revenue Act were barely sufficient to enable the Company to live, only yielding to its stockholders an income of 4½ per cent. If the stamp duty is also to be charged against this income then the rates enacted by the Railroad Commission of Georgia are unreasonably low, and the Commission has failed to observe "the limitations of the fourteenth amendment of the "Constitution of the United States," and neither the express company nor its stockholders are bound by the orders of the Commission. If the four and half per cent. income is further reduced by the stamp duty of $42,000 a year a fair income on the money invested in the Company does not result, especially when *seven per cent.* is the legal rate of interest in Georgia, and is the rate exacted in all accountings and the closing of fiduciary relations.

Again, it is not within these constitutional "limitations" for the Commission to say who shall pay the stamp duty.

The Express Company had the right to file a cross bill, in which these matters would have been set out in detail, but the Commission appealed from Judge Speer's interlocutory decision before such action was had under the rules. Therefore the Circuit Court of Appeals in directing a dismissal of the bill when there was no special demurrer for failure to state the capital stock, income, etc., acted prematurely and beyond its jurisdiction.

It is respectfully insisted that the decision of the Circuit Court of Appeals dismissing the bill should be reversed.

Respectfully submitted,

FRANK H. MILLER,
Sol. for Petitioners in Certiorari,
Augusta, Ga.

CONSTITUTION AND STATUTES CITED ON BRIEF.

Constitution, 1877, Art. 4. Sec. 2; par. 1; Code 5797.

"The power and authority of regulating railroad freight and passenger tariffs, preventing unjust discriminations and requiring reasonable and just rates of freight and passenger tariff are hereby conferred upon the General Assembly, whose duty it shall be to pass laws from time to time to regulate freight and passenger tariffs, to prohibit unjust discriminations on the various railroads of this State, and to prohibit such roads from charging other than reasonable rates and enforce the same by adequate penalties."

Act of Oct. 14th, 1879, P. Laws 125 now section 2190. Civil Code of 1895:

"That said railroad commissioners are hereby authorized and required to make for each of the railroad corporations doing business in this State as soon as practicable a schedule of just and reasonable rates of charges for transportation of passengers and freight and cars on each of said railroads."

Section 3, now section 2187 of the Civil Code of 1895 is as follows:

"If any railroad corporation, organized or doing business in this State, under any Act of incorporation or general law of this State now in force, or which may hereafter be enacted, or any railroad corporation organized, or which may hereafter be organized under the laws of any other State, and doing business in this State, shall charge, collect, demand or receive more than a fair and reasonable rate of toll or compensation for the transportation of passengers or freight of any description, or for the use and transportation of any railroad car upon its track, or any of its branches thereof, or upon any railroad within this State which it has the right, license, or permission to use, operate or control, the same shall be deemed guilty of extortion, and upon conviction thereof, shall be dealt with as hereinafter provided."

Code of 1895, section 2196:

"If any railroad company doing business in this State, by its agents of employees, shall be guilty of a violation of the rules and regulations provided and prescribed by said commissioners, and if, after due notice of such violation given to the principal officer thereof, ample and full recompense for the wrong or injury done thereby to any person or corporation, as may be directed by said commissioners, shall not be made within thirty days from the time of such notice, such company shall incur a penalty for each offense of not less than one thousand dollars, nor more than five thousand dollars, to be fixed by the presiding judge. An action for the recovery of such penalty shall be in any county in the State, where such violation has occured or wrong has been perpetrated, and shall be in the name of the State of Georgia. The commissioners shall institute such action through the Attorney-General or Solicitor-General, or such other Attorney at law of this State as the said commissioners may appoint, whose fees shall be the same as now provided by law. The commissioners shall have the power, in their discretion, to institute suit, without notice, for any violation of said rules and regulations, whenever in their opinion the circumstances authorize it, of which they shall be the sole judges; and after the institution of said suit there shall be no settlement of the same without the consent of the commissioners.

Code, 1895, section 2197.

"That if any railroad company doing business in this State shall, in violation of any rule or regulation provided by the commissioners aforesaid, inflict any wrong or injury on any person, such person shall have a right of action and recovery for such wrong or injury in the county where the same was done, in any Court having jurisdiction thereof, and the damages to be recovered shall be the same as in actions between individuals, except that, in cases of willful violation of law, such railroad companies shall be liable to exemplary damages: *Provided*, that all suits under this Act shall be brought within twelve months after the commission of the alleged wrong or injury.

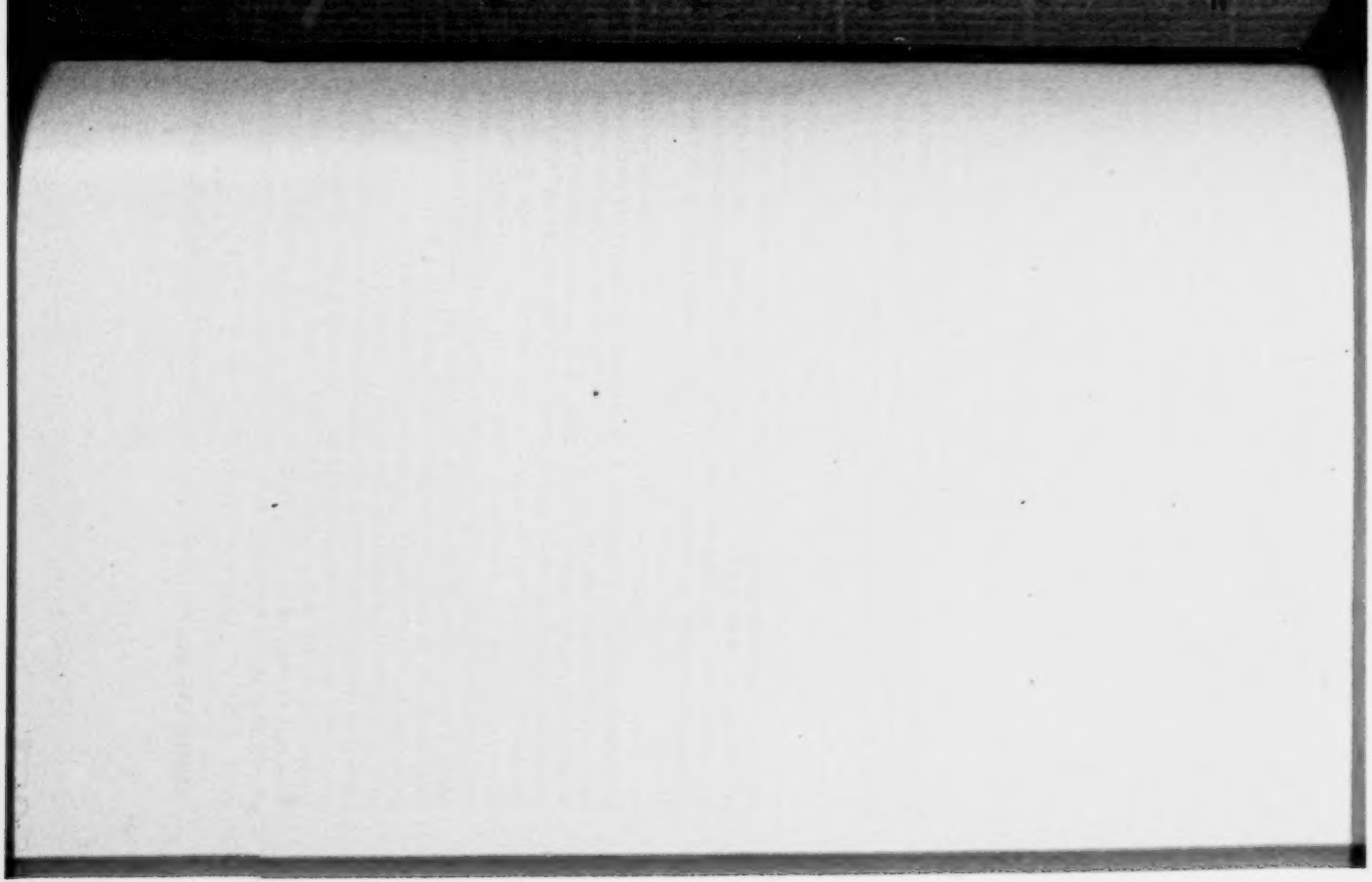
ACT OF OCTOBER 21, 1891, P. LAWS 151. NOW SECTIONS 2217-2218 OF THE CODE OF 1895.

SECTION 2217. "All companies or persons owning, controlling or operating a line or lines of *express* or telegraph, which are in whole or in part in this state, shall be under the control of the Railroad Commissioners of this State, who shall have full power to regulate the prices to be charged by any company or persons owning, controlling or operating any such line or lines, for any service performed by such company or persons, and all the powers given to said commissioners over railroads, in this state, and all the penalties prescribed against railroad companies or persons operating railroads, are hereby declared to be of force against corporations, companies, or a person or persons owning, controlling or operating a line or lines of express and telegraph, doing business in this state, whose line or lines is or are, wholly or in part, in this State, so far as said provisions can be made applicable to any corporation, person or persons, owning, controlling or operating a line or lines of express and telegraph. The said commissioners shall also have power and authority to require said companies to locate agencies at railroad stations.

SEC. 2218. The powers of the commissioners to regulate charges by corporations, companies and persons herein referred to, shall apply only to charges by express for transportation from one point to another in this state, and to messages sent by telegraph from one point to another in this state.

CODE 1895, SECTION 2276.

A common carrier cannot limit his legal liability by any notice given, either by publication or by entry on receipts given or tickets sold. *He may make an express contract*, and will then be governed thereby.



Supreme Court of the United States

OCTOBER TERM, 1900.

No. 309.

WILLIAM B. DINSMORE AND C. GRAY DINSMORE, AND WILLIAM B. DINSMORE, C. GRAY DINSMORE AND DUMOND CLARK, AS EXECUTORS AND TRUSTEES UNDER THE WILL OF WILLIAM B. DINSMORE, DECEASED, APPELLANTS.

vs.

THE SOUTHERN EXPRESS COMPANY; L. N. TRAMMELL, THOMAS C. CRENSHAW, JR., AND SPENCER R. ATKINSON, COMPOSING THE RAILROAD COMMISSION OF THE STATE OF GEORGIA, ET AL, APPELLEES.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND RETURN.

Brief of FRANK H. MILLER for Petitioners in Certiorari and Appellants, Particularly in Reply to Positions taken in Brief of the Attorney General of the State of Georgia of file.

I.

The Attorney-General says:

(1). That the Complainants' bill is in effect, a suit against the State, and she cannot be sued, as she has not given her consent.

This proposition is untenable. This is not a suit against the State, but a suit against certain persons who attempt, in the name of a State

Commission, to coerce a State corporation partly owned by complainants. The State of Georgia has not authorized the Railroad Commission to determine and prescribe rates, rules, and orders for laying and collecting the taxes of, as to it, a foreign Government. If it did it would be entirely beyond the authority of the State so to do. The State can only act in the line of its powers; it can only legislate on State matters; the State Commission can only prescribe rules and regulations for the transportation of freight and passengers *within the State* (70 Ga., 694; 128 U. S., 174), and the question as to who—whether the express company or the shipper—shall pay the internal revenue tax of the United States is a matter entirely beyond the State's control. And to say that a suit to restrain officers who have thus usurped the name of the State to enforce their regulations in reference to the payment of a United States' internal revenue tax, is a suit against the State, is simply an effort to use the name of the State to shield an illegal act.

As to what is a suit against the State and what not, see *Smythe vs. Ames*, 169 U. S., 519; *Tindall vs. Wesley*, 167 U. S., 213, 220; *Tyler* case, 149 U. S., 190; United States vs. Lee, 106 U. S., 196; Scott vs. *McDonald*, 165 U. T., 68; 164 U. S., 592-5; 140 U. S., 1.

Again, it has been repeatedly held that suits against commissioners are not suits against the State. 57 Fed. R., 436; Elliot on R. R., §683, 700; 156 U. S., 657, *Gill case*; 164 U. S., 592, *Turnpike case*, 169 U. S., 517, *Ames case*.

Even if the statute under which the act is done be conceded to be constitutional. 154 U. S., 390, top to bottom, *Texas case*, 57 Feb. R., 436, *South Carolina Dispensary case*. The Fitts case 172 U. S., 529; has no application.

II.

The Attorney-General says there is no equity in the Bill. Stockholders have a right to go into a Court of Equity to prevent the corporation from obeying an illegal or unconstitutional order which they fear might subject it to a penalty at the hands of the State Board of Commissioners, particularly when said Board of Commissioners had no authority nor jurisdiction to pass the order in question; and also, where the effect of their order would be to deprive them of their property without due process of law, or, in other words, prescribe rates for the corporation which would compel it to do business at a loss, thereby taking its property for the benefit of the public without just compensation being paid therefor, and thus denying it the equal protection of the laws, and possibly, subjecting the corporation to a multiplicity of suits.

169 U. S., 466, 517; 64 Fed. R., 165; 154 U. S., 362; 164 U. S., 592; 168 U. S., 169; 156 U. S., 649, 658; 162 U. S., 194, 197; Judge McCormick's decisions in 90 Feb. R., 683, 51 Feb. R., 529. Stockholders

can prevent in equity a corporation from voluntarily paying an illegal tax. Income tax case, 157 U. S., 429.

The Attorney-General demurs specially because there is an adequate remedy at law. This adequate remedy pointed out by him consists in waiting for suits to be brought against the express company for each failure to affix a stamp, and then for the express company to show in each case that the order of the commission upon which the suit is based was illegal. This would be putting all the chances against the express company. Instead of being an adequate remedy it would be wholly inadequate, because the express company might lose, and subject itself to severe penalties by so doing. Again, the Southern Express Company is obeying this order, and a request of the complainaints, made to it prior to suit, was refused and disregarded, so that, so far as complainants are concerned, with the express company obeying the order, the issue pointed out by the Attorney General could never be raised. The opportunity to raise the question of the adequate remedy by him pointed out would never occur, unless there was a suit brought to enforce penalties, which could not be brought against a corporation obeying the order of the State Commission.

169 U. S., 515-6.

III

The Attorney-General says the United States Court has no jurisdiction.

(*a*) Because the Superior Courts of Georgia have exclusive jurisdiction.

It would be unconstitutional to deny to the complaints in this cause the same rights to sue in the Federal Courts which a Georgia citizen would have to sue in the Georgia Courts. The Georgia Courts may be exclusive (which is denied) for the citizens of Georgia, but such rule cannot apply to a non-resident.

In the *Texas Commission* case, 154 U. S., 362, the Court say, page 391, "Whenever a citizen of a state can go into the Courts of a State " to defend his property against the illegal acts of its officers, a citizen " of another state may invoke the jurisdiction of the Federal Courts " to maintain a like defence." Quoted in *Smythe vs. Ames*, the Nebraska case, 169 U.S., 517, although in that State a *special remedy* was given in the State Court.

See Ga. case, 70 Ga., 694, 704.

See also 164 U. S., 592, Turnpike case.

See Decisions of Judge Brewer on Circuit in Ames case, 64 Fed.R., 172, Quoted 2 Elliott on R. R., §702.

Adequate remedy at law is defined in 64 Fed. R., 172, as one absolutely and of right which gives relief from the wrong done, Texas Com. case, 154 U. S., 362, 2 Elliott, §702.

The Attorney-General also demurs

(*b*) Because the acts complained of are in the discretion of the Railroad Commission, and the Courts have no jurisdiction on the subject matter.

This cannot be the law. The Commission is not above the law, nor the process of the Courts. 154 U. S., 397; 169 U. S., 518-9; 164 U. S., 592-5. Besides the Commission has no jurisdiction whatever itself to frame laws, rules, and regulations providing for the payment of the internal revenue tax of the United States Government, of which they are no part.

The Commission is only a State administrative Board for carrying into effect the legislature's will. 116 U. S., 307; 154 U. S., 394-7.

And there is a remedy in the Courts to prevent their abuse of power and enforcement of unreasonable regulation. 164 U. S., 592 Turnpike case; 169 U. S., 516-19 Ames case; 156 U. S., 657 Gill case.

2 Elliott on R. R., §691, says question is no longer *open*.

57 Federal Report, 437, Judge Simonton. Judge Pardee in *Louisiana vs. LaGarde*, 60 Fed. Rep., 186-192.

If there was no remedy to inquire into the acts and rates fixed by the Commission, but its orders were conclusive, then the law under which it acts would be unconstitutional. 134 U. S., 418; 169 U. S., 523.

(*c*) The Attorney-General says the power to prescribe just and reasonable rates is legislative and not judicial, and the Courts have no jurisdiction to inquire whether the power is properly exercised.

If this is correct then the Supreme Court of the United States, the Supreme Court of Georgia, and of almost every other State in the Union, have made a great mistake in enjoining rates prescribed by Railroad Commissions, or enjoining orders promulgated by such bodies.

The question raised is not legislative, but one for "*judicial investigation.*"

154 U. S., 398 (middle); 134 U. S., 458; 169 U. S., 518; 156 U. S., 649, et 657. Turnpike case 164 U. S. bottom 579, at 592 5.

The powers of the Georgia Commission are not *legislative*. 70 Ga., 694-704; 128 U. S., 523; but *quasi* judicial, 2 Elliott on R. R., §683, or rather ministerial, 2 Elliott, §691. Page 997.

(San Joaquin &c. vs. Stanislaus Co., 90 Fed. R., 517-521.)

IV.

In conclusion. The principal question in this case is as to the authority of a State Railroad Commission to "lay and collect" taxes for the general government. The Constitution of the United States gives Congress only authority to "*lay and collect*" Federal taxes. This Court has held, in the Michigan case, 177 U. S., 404, that the stamp duty is a floating or shifting tax, and that the express company has the right to contract with the shipper for its payment. The State

law also gives the express company the right to make a special contract as to carriage.

Therefore, when a Railroad Commission distinctly decides that the express company alone shall pay this tax, it in effect violates the Act of Congress, which has not put this duty upon the express company only; and further, it usurps the power of Congress, in that it is a state authority, "lays" on the express company, a tax, which is alone the province of Congress to lay under the Constitution; and further, by its order notifies the company that it will enforce the collection of the taxes thus laid by requiring the express company to make the payment and compel this by confiscatory suits in the Superior Courts of the State.

Surely, all this is entirely outside of the authority given the Commission to fix rates for the carriage of passengers and freights and should be prevented.

Since the decision in this case in the Court below, the Supreme Court of Georgia, on June 5th, 1900, in the case of the Southern Railroad Company vs. Watson, 110 Ga., Reports, 687, when having before it section 2276 of the Code of 1895, which enacts, "A common carrier * * may make an express contract, and will then be governed thereby," and which was set up in behalf of a carrier of passengers, held, "It is our opinion that the provisions of this section of the Code do not apply in any way to a carrier of passengers, but they apply exclusively and alone to a *common carrier*, that is, a carrier of goods." So that the validity and force of this section, recognized in favor of the carrier of goods, would be in effect absolutely destroyed if it is in the power of the Railroad Commission of Georgia to deny to the express company its right to contract, and in addition, to order payment in full by the carrier, of this Federal tax, imposed upon each receipt for the shipment of goods by the company.

Respectfully submitted,

FRANK H. MILLER,

Solicitor for Dinsmore et al., Augusta, Ga.

No. 390. 136

Motion to advance.

Office Supreme Court U.S.
FILED
NOV 16 1900
JAMES H. McKENNEY,
Clerk.

Filed Nov. 16, 1900.

Supreme Court of the United States,

OCTOBER TERM, 1900.

No. 390.

WILLIAM B. DINSMORE AND C. GRAY DINSMORE, AND WILLIAM B. DINSMORE, C. GRAY DINSMORE, AND DUMONT CLARKE, AS EXECUTORS AND TRUSTEES UNDER THE WILL OF WILLIAM B. DINSMORE, DECEASED, APPELLANTS,

vs.

THE SOUTHERN EXPRESS COMPANY; L. N. TRAMMELL, THOMAS C. CRENSHAW, JR., AND SPENCER R. ATKINSON, COMPOSING THE RAILROAD COMMISSION OF THE STATE OF GEORGIA, ET AL., APPELLEES.

Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, and Return.

Motion by Petitioners in Certiorari and Appellants to Advance, in Which The Appellees Join and Concur.

To the Railroad Commissioners of the State of Georgia, and to the Honorable Joseph M. Terrell, attorney General of the said State, and Solicitor for the said Commissioners. Also to the Southern Express Company:

PLEASE TAKE NOTICE

That on Monday, November 19th, 1900, at the opening of the Supreme Court of the United States on that day, or as soon thereafter as counsel can be heard, a motion will be made to advance, under the rules of the Court, the cases of William B. Dinsmore, et al., Appallants, vs. the Railroad Commissioners of the State of Georgia, Appellees, and William B. Dinsmore, et al., Appellants, vs. The Southern Express Company and others, Appellees—brought up to the Supreme Court of the United States under writ of certiorari of the Circuit Court of Appeals of the United States for the Fifth Circuit, and being No. 390 on the Docket of the Supreme Court of the United States, October term, 1900.

FRANK H. MILLER,
Solicitor for William B. Dinsmore and others.

Service of the above notice is hereby acknowledged; copy received by the Southern Express Company, which consents that the motion be granted.

Nov. 8, 1900.

F. G. DUBIGNON,
Attorney for Southern Express Co.

Service of the above notice is hereby acknowledged; copy received by me this day as Attorney-General of the State of Georgia and Solicitor for the Railroad Commissioners thereof.

Consent is hereby given to the granting of the motion by the Court. I also join in the motion and request to advance, and in doing so invoke an application of Section 949 of the Revised Statutes, inasmuch as the State of Georgia is practically a party.

This Nov. 10, 1900.

J. M. TERRELL,
Of Counsel for the Railroad Commission of Ga.

Supreme Court of the United States.

OCTOBER TERM 1900.

No. 390.

WILLIAM B. DINSMORE AND C. GRAY DINSMORE, AND WILLIAM B. DINSMORE, C. GRAY DINSMORE, AND DUMONT CLARK, AS EXECUTORS AND TRUSTEES UNDER THE WILL OF WILLIAM B DINSMORE, DECEASED, APPELLANTS.

vs.

THE SOUTHERN EXPRESS COMPANY; L. N. TRAMMELL, THOMAS C. CRENSHAW, JR., AND SPENCER R. ATKINSON, COMPOSING THE RAILROAD COMMISSION OF THE STATE OF GEORGIA, ET AL., APPELLEES.

Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit and Return.

And now come the petitioners in certiorari and the Appellants, W. B. Dinsmore, et al., and respectfully move the Court to advance the above-stated case for hearing at the earliest practicable time at its present session. That for cause for the granting of this motion, they respectfully state :

First. That the questions involved in the suit are of gravity and importance to the nation at large, in that, besides the State of Georgia, the States of North Carolina, South Carolina, Mississippi and Arkansas, are within the territory occupied by the Southern Express Company. Each State has a Railroad Commission. In North Carolina and South Carolina they have passed orders substantially the same as in Georgia, which require the Express Company alone to pay the revenue stamp tax on receipts issued for transportation, and have deprived the Company of its right to contract with the shipper so to do. Other Railroad Commissions are awaiting the result of this case. In Illinois, Ohio, Indiana, Iowa, Kentucky, Michigan, Minnesota, Wisconsin, New York, North Dakota, Missouri Kansas and Nebraska, the territory of other

express companies, there are also State Railroad Commissions, the authority delegated to each being slightly different, but none of the States, North or South, have delegated to any of their Railroad Commissions any other or greater authority than to fix rates and enforce their orders in reference thereto by confiscatory suits.

Second. It is important to at once define the power, if any, and the limits of the power, that these State Administrative Boards have to determine who shall and who shall not pay a stamp duty lawfully imposed by Congress, when under the Constitution the power is given Congress alone to "levy and collet taxes," &c. In this case the Circuit Court of Appeals have in effect, held that the Georgia Commission had the power to determine who shall pay said stamp duty and enforce collection thereof by state statutory penalty suits, after the decision of this Court in 167 U. S. 404, 419.

Third. It is important to the shipping public and the express companies throughout the United States to finally know who is required by the said Act of Congress to pay the stamp duty on receipts for packages transported by express within the several states comprising the United States. And whether the Act of Congress or the decisions of Railroad Commissions of the respective states control.

Fourth. It is important to have adjudicated whether or not a uniform excise duty imposed by Congress, can be held, in a case where the one-cent stamp on an express receipt is required by the company to be attached by the shipper before transporting goods, "to manifestly discriminate, largely and unjustly, between the shipper of a small package for a short distance for a low rate, and the shipper of a larger package for a longer distance at a larger rate."

Fifth. It is important to the stockholders and the Express Company to have relief from the great expense put upon the company, alone aggregating in the one State of Georgia $40,000 per annum, and daily continuing over the States of North Carolina and South Carolina, the state of the pleadings being such that no supersedeas can be obtained pending final decision herein—so that complainants sustain daily an irreparable loss.

In the brief of file in behalf of the Railroad Commissioners of Georgia, by the Attorney-General, it is stated in proposition No. 3 thereof:

> "This is a suit against the State of Georgia. Its principal object "is to enjoin penalty suits against the Southern Express Company. "The penalty, if recovered, is for violation of the State law. Ac- "tions to recover the same are to be prosecuted in the name of the "State. The amount of any recovery had under such suits is to be

"paid into the State Treasury and used for the benefit of the "State."

To this brief is annexed a copy of the decision of Commissioner Atkinson, made the judgment of the Railroad Commsssion, which holds that a failure or refusal on the part of the Company to accept for shipment goods tendered to it without prepayment by the shipper of the revenue tax required by it to be affixed to its bill of lading, is a violation of the provisions of the Act of Congress and incurs the penalties which are therein prescribed.

This penalty is not less than $1,000 nor more than $5,000 for each offense, this risk the Company runs under existing circumstances for every failure or refusal on its part to obey the order of the Railroad Commission itself.

It is therefore, respectfully urged, that this case is one that falls within the seventh section of Rule 26 of this Court, as one attended by the special and peculiar circumstances herein stated, and as such should be advanced. This is admitted by the Attorney General, who also claims that the case should be advanced under section 949 of the Revised Statutes, as one to which the State of Georgia is practically a party.

FRANK H. MILLER,
Attorney for Appellants and Petitioners in Certiorari,
705 Broad St., Augusta, Ga.

No. 220. 136.

Off. of DuBignon for Resp't.

Office Supreme Court U.S.
FILED
OCT 15 1900
CLERK

Supreme Court of the United States.

October Term, 1900.

No. 220.

Filed Oct. 15, 1900

William B. Dinsmore and C. Gray Dinsmore, and William B. Dinsmore, C. Gray Dinsmore, and Dumont Clarke, as Executors and Trustees under the Will of William B. Dinsmore, Deceased, Petitioners,

vs.

The Southern Express Company, L. N. Trammell, Thomas C. Crenshaw, Jr., and Spencer R. Atkinson, composing the Railroad Commission of the State of Georgia, et al.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Statement of Southern Express Company in response to notice of the application of petitioners for writ of certiorari.

FLEMING G. duBIGNON,
Attorney for Southern Express Company,
Savannah, Georgia.

SAVANNAH GA
THE MORNING NEWS PRINT
1900.

Supreme Court of the United States.

October Term, 1900.

No. 390.

William B. Dinsmore and others,

vs.

The Southern Express Company and others.

Petition for writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review and reverse decision of the Circuit Court of Appeals as reported in 102 Federal Reporter, 794, reversing decision in the Court below, reported 92 Federal Reporter, 714.

Statement of the Southern Express Company in response to notice of the application of petitioners for writ of certiorari.

In response to the notice of the application of the petitioners herein for writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, served upon the Southern Express Company on August the 7th, 1900, it respectfully submits:

1. That the Southern Express Company, a corporation existing under the laws of Georgia, and a

common carrier of express matter, did, after the passage of the Act of Congress, approved June 13th, 1898, require that its patrons supply, at their expense, the revenue stamps necessary to be attached to and cancelled upon "bills of lading, manifests, or other memorandum, and to each duplicate thereof," under the provisions of sections 6 and 25 of the said Act of Congress.

2. That certain citizens of Georgia refused to supply, at their expense, the stamps necessary to be attached to "bills of lading, manifests, or other memorandum," and thereupon entered their complaint to the Railroad Commissioners of Georgia, who, after consideration, issued an order reciting that it had been represented to the Commission that the Southern Express Company had "exacted and continues to exact from shippers, as a condition precedent to forwarding any goods tendered to it for transportation between points within the State, the payment of a special tax upon such shipments imposed by said Act, thus indirectly increasing the cost of transportation beyond the rate fixed therefor by this Commission," and requiring the Southern Express Company, on a day named, "to show cause, if any it can, why it should not be held to have violated the rules and regulations of this Commission by the exactions or overcharges, as aforesaid, and why suit should not be instituted against it in every case of such overcharges for the recovery of the penalty provided by law for such illegal act." (Record, page 5).

3. That the Southern Express Company appeared, as required by said order, and denied that the Railroad Commission of Georgia had any jurisdiction in the premises. (Record, page 5.)

4. That thereafter, on August the 2nd, 1898, the said Railroad Commission of Georgia, through its Chairman, "ordered that unless within five days from this date this Commission is advised by the Southern Express Company that it has discontinued the practice of exacting from shippers the duty of furnishing the requisite revenue stamps to be attached to bills of lading or receipts as a condition precedent to receiving and forwarding goods tendered for shipment, that this Commission will take such legal steps as may be necessary to enforce compliance with its rules and regulations." (Record, page 55.)

5. That under the constitution and statute laws of Georgia (See record, pages 5 and 6), the penalty fixed for violating any order or rule or regulation of the Railroad Commission of Georgia is not less than one thousand dollars nor more than five thousand dollars for each offense.

6. That the Southern Express Company "declined to test in the Courts the question whether the war stamp tax on its bills of lading and manifests is payable by the shipper or by itself. This was done because of the enormous penalties—from one thousand to five thousand dollars fine in each case—with which it was solemnly threatened by the Railroad Commission unless in five days it abandoned its contention that the shipper must pay the tax, accept all shipments and itself furnish, affix and cancel the stamps." (Record, page 29). The Southern Express Company, through its directors, resolved that "it is deemed expedient to comply with the orders of the Railroad Commission of Georgia in the premises, in order to avoid penalties under the laws of Georgia and so clouding the Company's title to its

corporate franchises and rights as to embarrass its action." (Record, page 30).

7. That the Southern Express Company considered, and does yet consider, that the Railroad Commission of Georgia was without jurisdiction in the matter and that its aforesaid order therein was illegal; but for the reasons hereinbefore stated, it deemed it expedient to comply with said order.

8. That the Southern Express Company believes that the judgment rendered by the Circuit Court of Appeals for the Fifth Circuit, in this case, is erroneous in the particulars stated, and for the reasons assigned by petitioners herein on their application for writ of certiorari.

Respectfully submitted,

FLEMING G. DuBIGNON,
Attorney for Southern Express Company,
Savannah, Ga.

No. 390.

FILED
OCT 15 1900
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 390.

Filed Oct. 15, 1900.

WILLIAM B. DINSMORE AND C. GRAY DINSMORE, AND WILLIAM B. DINSMORE, C. GRAY DINSMORE AND DUMONT CLARKE, AS EXECUTORS AND TRUSTEES UNDER THE WILL OF WILLIAM B. DINSMORE, DECEASED, Petitioners,

vs.

THE SOUTHERN EXPRESS COMPANY; L. N. TRAMMELL, THOMAS C. CRENSHAW, JR., AND SPENCER R. ATKINSON, COMPOSING THE RAILROAD COMMISSION OF THE STATE OF GEORGIA, ET AL.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth District.

BRIEF OF JOSEPH M. TERRELL, OF COUNSEL FOR THE RAILROAD COMMISSION OF GEORGIA.

ATLANTA, GEORGIA
The Franklin Printing and Publishing Company
1900

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1900,

No. 390.

WILLIAM B. DINSMORE AND C. GRAY DINSMORE, AND WILLIAM B. DINSMORE, C. GRAY DINSMORE AND DUMONT CLARKE, AS EXECUTORS AND TRUSTEES UNDER THE WILL OF WILLIAM B. DINSMORE, DECEASED, Petitioners,

vs.

THE SOUTHERN EXPRESS COMPANY; L. N. TRAMMELL, THOMAS C. CRENSHAW, JR., AND SPENCER R. ATKINSON, COMPOSING THE RAILROAD COMMISSION OF THE STATE OF GEORGIA, ET AL.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth District.

BRIEF OF JOSEPH M. TERRELL, OF COUNSEL FOR THE RAILROAD COMMISSION OF GEORGIA.

STATEMENT OF THE CASE.

Complaint being lodged with the Railroad Commission of Georgia against the Southern Express Company to the effect that the company, a Georgia corporation, engaged as a common carrier in the transportation of goods between points within the State of Georgia, demanded as a condition precedent to forwarding goods tendered to it for shipment that the consignor deliver to it the necessary revenue stamp to be af-

fixed to the bill of lading required to be issued by the War Revenue Act, or pay the cost of such revenue stamp, and that it refused to transport and deliver goods tendered it for shipment except upon compliance with such demand, and that such conduct was a violation of those provisions of the law in this State limiting the rates of freight chargeable by express companies to the rates prescribed by the Commission, an order was thereupon issued by the Commission calling upon the Southern Express Company to show cause why suits should not be instituted against it for the recovery of the penalties prescribed by law for the exaction from shippers of a stamp in addition to and in excess of the rates prescribed by the Commission. In response to this rule the company by its counsel appeared and answered in effect that the Commission had no jurisdiction to inquire of and determine the several matters and things set forth in the rule, and admitted that it had declined to receive goods for shipment unless a tax imposed by the War Revenue Act upon each and every bill of lading was tendered with the goods intended to be consigned, and denied that the Commission had any authority to inquire or act concerning any such refusal by it to receive goods for transportation. Upon the consideration of this rule and answer the Railroad Commission passed on the 2d day of August, 1898, the following order:

"RAILROAD COMMISSION OF GEORGIA,
ATLANTA, GA., August 2, 1898.

"*In re*, complaint against the Southern Express Company for overcharges in demanding that shippers furnish revenue stamps to affix to bills of lading or receipts.

"On motion of Commissioner Crenshaw it is ordered: That the report and opinion this day filed by Commissioner Atkinson, to whom the above entitled matter was referred, be, and the same is, hereby adopted as the opinion and judgment of this Commission.

"And it is further ordered: That unless within five days from this date this Commission is advised by the Southern Express Company that it has discontinued the practice of exacting from shippers the duty of furnishing the requisite revenue stamps to be attached to bills of lading, or receipts as a condition precedent to receiving and forwarding goods tendered for shipment, that this Commssion will take such legal steps as may be necessary to enforce compliance with its rules and regulations.

By order of the board.

L. N. TRAMMELL, Chairman.

J. D. MASSEY, Secretary."

The opinion of Commissioner Atkinson referred to in said order is hereto attached and made a part of this brief.

The Southern Express Company duly notified the Commission of its intention to comply with this order. Whereupon William B. Dinsmore *et al.*, citizens of New York, and stockholders of the Southern Express Company, filed their bill against the Southern Express Company and L. N. Trammell, T. C. Crenshaw, Jr., and Spencer R. Atkinson, individually, and as Railroad Commissioners, and J. M. Terrell, individually, and as Attorney-General, praying that the Southern Express Company be restrained from voluntarily complying with the provisions of said order of August 2, 1898, and from paying the war revenue tax, and that said order of August 2d be adjudged and decreed to be without jurisdiction on the part of the Commission and unconstitutional, null and void, and that the Railroad Commission and the Attorney-General be restrained from instituting any suit of any sort against the Southern Express Company for the purpose of enforcing the provisions of said order of August 2, 1898. (Printed Record, page 9.)

To this bill these State officials filed a general and special demurrer—P. R., pages 20, 21 and 22. The additional special

demurrer of the Attorney-General—P. R., pages 22 and 23—being practically sustained in that the Court refused to enjoin that officer.

This cause was heard upon the bill and demurrer thereto on the 10th day of February, 1899, and his Honor, Judge Emory Speer, rendered a decree therein on the 7th day of March, 1899, denying the prayer that the Southern Express Company be enjoined from voluntarily paying the war stamp tax in question, and enjoining the Railroad Commission of Georgia and each member thereof "from any and all order, direction, action or legal steps instituting, or tending to institute, and from any and all proceedings for the recovery of the penalties named in the statute of Georgia in that behalf to enforce compliance with its said order against the Southern Express Company, its officers or agents, as threatened in the order of said Commission, dated August 2, 1898, for the reason that said order is null and void, and said Commission has no jurisdiction to adjudge and designate the party who shall pay the tax."—P. R., page 35. To this decree the Railroad Commission of Georgia entered an appeal, and W. B. Dinsmore *et al.* entered a cross-appeal.

The opinion of the Circuit Court by Judge Emory Speer, which was filed with said decree, will be found on page 29 of printed record, and also 92 Fed. Rep. 715. The Circuit Court of Appeals reversed Judge Speer and ordered the bill dismissed. P. R., pages 57–61, also 102 Fed. Rep. 794—Judge Shelby dissenting—P. R., page 61, also 102 Fed. Rep 803.

Assignments of Error on the Appeal relied upon were as follows:

1. That the Court erred in not sustaining the demurrer of these defendants to the bill of said W. B. Dinsmore *et al.* Said demurrer should have been sustained upon each and every ground therein mentioned.

2. That the Court erred in granting the injunction against these defendants as set out in said decree.

3. That the Court erred in holding the order rendered by these defendants, as Railroad Commissioners, on the 2d day of August, 1898, to be null and void.

4. That the Court erred in holding that under the facts and circumstances set forth in said bill these defendants as Railroad Commissioners of Georgia did not have competent authority under the law for the institution and prosecution of the said threatened suits.

5. That the Court erred in holding that the said action of the said Express Company in compelling the consignor to pay a charge which had been imposed by the War Revenue Act of 1898 upon it did not amount to an increase of the rate prescribed by the said Railroad Commission for express companies doing business in Georgia.

6. That the Court having under said bill taken jurisdiction in equity for the purpose of preventing the institution and prosecution of a multiplicity of suits respecting the same subject matter erred in declining to consider, adjudicate and determine the principal matters in controversy, that is to say, whether the said Express Company or the consignor was liable for said tax, and whether the said Express Company being so liable the said Railroad Commissioners had competent authority to institute and prosecute said threatened suits, and further erred in granting the said injunction without determining said matters. P. R., pages 36 and 37.

Assignments of Error on the Cross-Appeal were as follows:

1. That the Court erred in denying any injunction against the Southern Express Company as prayed for.

2. That the Court erred in refusing to enjoin the Southern Express Company from voluntarily complying with the order of the Railroad Commission of August 2, 1898, set out in the Complainants' bill.

3. That the Court erred in refusing to enjoin the Southern

Express Company from paying the War Revenue tax imposed under the Act of Congress approved June 13, 1898, entitled: An Act to provide ways and means to meet war expenditures, and for other purposes—namely, a stamp of the value of one cent to each bill of lading, manifest, or memoranda, and to each duplicate thereof, which the Railroad Commission, on August 2, 1898, ordered the Express Company to pay and they continued to pay because of such order. P. R., page 41.

Sections of the Georgia Code cited on this brief, and deemed necessary to the decision of the case. As to the enactment of the Code see 104 Ga. 831.

Section 2187. "If any railroad corporation organized or doing business in this State under any act of incorporation or general law in this State now in force, or which may hereafter be enacted, or any railroad corporation organized or which may hereafter be organized under the laws of any other State, and doing business in this State, shall charge, collect, demand or receive more than a fair and reasonable rate of toll or compensation for the transportation of passengers or freight of any description, or for the use and transportation of any railroad car upon its track, or any of its branches thereof, or upon any railroad within this State which it has the right, license or permission to use, operate or control, the same shall be deemed guilty of extortion, and, upon conviction thereof, shall be dealt with as hereinafter provided."

Section 2189. "The commissioners shall make reasonable and just rates of freight and passenger tariffs, to be observed by all railroad companies doing business in this State, on the railroads thereof; shall make reasonable and just rules and regulations, to be observed by all railroad companies doing business in this State, as to charges at any and all points for the necessary handling and delivering of freights; shall make such just and reasonable rules and regulations as may be necessary for preventing unjust discriminations in the transportation of freight and passengers on the railroads in this State;

shall have the power to make just and reasonable joint rates for all connecting railroads doing business in this State, as to all traffic or business passing from one of said roads to another; *Provided, however,* that before applying joint rates to roads that are not under the management and control of one and the same company, the commissioners shall give thirty days' notice to said roads of the joint rate contemplated, and of its division between said roads, and give hearing to roads desiring to object to same; shall make reasonable and just rates of charge for use of railroad cars carrying any and all kinds of freight and passengers on said railroads, no matter by whom owned or carried; and shall make just and reasonable rules and regulations, to be observed by said railroad companies on said railroads, to prevent the giving or paying of any rebate or bonus, directly or indirectly, and from misleading or deceiving the public in any manner as to the real rates charged for freight and passengers; *Provided,* that nothing in this Article contained shall be taken as in any manner abridging or controlling the rates for freight charged by any railroad company in this State for carrying freight which comes from or goes beyond the boundaries of the State, and on which freight less than local rates on any railroad carrying the same are charged by such railroad; but said railroad companies shall possess the same power and right to charge such rate for carrying such freights as they possessed before October 14, 1879; said commissioners shall have full power, by rules and regulations, to designate and fix the difference in rates of freight and passenger transportation to be allowed for longer and shorter distances on the same or different railroads, and to ascertain what shall be the limits of longer and shorter distances. And said Railroad Commissioners shall have power to require the location of such depots, and the establishment of such freight and passenger buildings, as the condition of the road, the safely of freight and the public comfort and convenience may require, upon the giving of such

railroad company to be affected thereby the same notice as herein provided."

Section 2190. "The railroad commissioners are required to make for each of the railroad corporations doing business in this State as soon as practicable, a schedule of just and reasonable rates of charges for transportation of passengers and freights and cars on each of said railroads; and said schedule shall, in suits brought against any such corporation, wherein is involved the charges of any such corporation for the transportation of any passenger or freight or cars or unjust discrimination in relation thereto, be deemed and taken in all the courts of this State as sufficient evidence that the rates therein fixed are just and reasonable rates of charges for the transportation of passengers and freights and cars upon the railroads; and said commissioners shall, from time to time and as often as the circumstances may require, change and revise such schedules."

Section 2196. "If any railroad company doing business in this State, by its agents or employees, shall be guilty of a violation of the rules and regulations provided and prescribed by said commissioners, and if, after due notice of such violation given to the principal officer thereof, ample and full recompense for the wrong or injury done thereby to any person or corporation, as may be directed by said commissioners, shall not be made within thirty days from the time of such notice, such company shall incur a penalty for each offense of not less than one thousand dollars nor more than five thousand dollars, to be fixed by the presiding judge. An action for the recovery of such penalty shall be in any county in the State, where such violation has occurred or wrong has been perpetrated, and shall be in the name of the State of Georgia. The commissioners shall institute such action through the attorney-general or solicitor-general."

BRIEF OF ARGUMENT.

The decision of the Circuit Court of Appeals should be sustained and the writ of *certiorari* denied for the following amongst other reasons:

I.

It is the duty of the Railroad Commission to make just and reasonable rates for express companies on their intra-state business. Section 2189 of the Code of Georgia empowers the Commission, amongst other things, to make just and reasonable rates of freight and passenger tariffs to be observed by all railroad companies doing business in the State of Georgia, on the railroads thereof, and just and reasonable rules and regulations to be observed by all of said railroads as to their charges and such as may be necessary to prevent unjust discriminations. Section 2187 makes it unlawful for a railroad to charge higher rates than those prescribed by the Commission, and Section 2196 provides the manner of enforcing compliance with such rules and regulations and authorizes the Commission to direct the bringing of penalty suits against such railroads as violate the rules and regulations. Section 2217 places express companies under the Commission to the same extent as railroads, prescribes the same penalties, and also declares that the Commission "shall have full power to regulate the prices to be charged by any company or persons owning, controlling or operating any such line or lines for any service performed by such company or person." In the exercise of these powers the Commission prescribed the rules and rates referred to in the original bill, P. R., page 6. Copies of rules and tariffs set out in full, P. R., pages 23 to 28.

The Southern Express Company being a common carrier, it is therefore its duty to receive for carriage, and to carry

the goods of any person tendered to it for transportation, provided the party tendering them offers to pay its proper charges, which, in the State of Georgia, on all intra-state business are the charges prescribed by the Commission, 5 Enc. Law, 158, and authorities cited. The company cannot evade this duty by regulations; see same authority. When the company by a rule seeks to impose on the shipper the payment of a tax which the law imposes upon it, such a rule is unreasonable. This is true even where the rates are not prescribed by law. See case of Covington Stock Yard Co. *v.* Keith, 139 U. S. 128.

If the rules and regulations prescribed by the Commission be unjust and unreasonable the same cannot be enforced. Under the facts as presented by Petitioners' bill the rates do not appear to be unreasonably low when the order of the Commission relative to the payment of this stamp tax is complied with by the express company. The cost of handling a package for which the minimum charge is allowed is not the average cost of all packages handled by the company. The fact that average cost of all packages handled exceeds ten cents, the minimum charge, as claimed in the bill, falls short of proving that the actual cost of handling such a package is ten cents. The minimum rate fixed by the Commission is 25 cents, as shown by the rate-sheet which is made a part of the bill (P. R., pages 23, 24, 25,) hence this allegation will be fully answered by reference to such rate-sheet.

The bill alleges that the payment of the stamp tax by the company on its intra-state business will cost it $42,000. It also alleges that when the company pays the same that its net profits on a twenty-five cent package will be only three-fourths of one cent. If all of the intra-state business of the company were done for the minimum charge of twenty-five cents, then its net income from that source alone would be $31-500 per annum. It appears from the bill that the Southern Express Company does business in ten other States besides Georgia, and that the aggregate shares of the company amount

to 50,000, and that the same are of the approximata value of $2,500,000, P. R., page 4. This would give the company about one and one-fourth per cent. net income upon its entire capital from its Georgia domestic business alone, based upon the proposition that every package was transported for the minimum charge. Assuming the business in the other States to be equally as large, which is by no means improbable, the company's income from its intra-state business in the eleven States will amount to a net income of nearly 14 per cent. Add to this the income from inter-state business, and it will be apparent that the rate instead of being unreasonably low is just the reverse—unreasonably high. If the allegations of complainants upon these matters be true then it would seem that their desire to restrain the payment of this revenue stamp tax by the company does not arise from their desire to have the company charge a reasonable rate, but springs from a desire to "own the earth and the fullness thereof." The order of the Georgia Commission doesn't deprive the Southern Express Company of any of its constitutional rights.

Under the common law the public, through the proper officer, or the shippers, in their own names, would have the right to enjoin an increase of a just and reasonable rate or the establishment of an unreasonable rate by a common carrier. So far as concerns the fixation of rates the powers of the Commission certainly cover all questions that the public or shippers may properly bring before the courts, either of law or equity, affecting the matter of rates.

If the tax were levied upon the gross receipts of the company instead of upon each and every bill of lading issued by it, would anyone seriously contend that the addition of such tax to the rates prescribed by the Commission did not increase those rates? The manner of imposing the tax does not and cannot effect the principle.

The action of the Railroad Commission, which was sought to be enjoined in this case, did not amount to an order either

establishing a new rate, nor adjusting an old rate to a new condition. It did not seek to impose a new duty upon the Express Company nor to enjoin upon it the performance of any duty already imposed; on the contrary it only amounted to a monition, and informed the Express Company that for the reasons stated in the opinion upon which the monition was founded, that if it insisted upon imposing upon the shipper the burden of this tax, the Commission would regard its action as an illegal increase of an existing reasonable rate, and would institute suits in the courts with a view of having the question judicially determined. The Commission had no power to and did not undertake to impose a penalty upon the Express Company. There is in the bill no equity alleged, which was founded upon such a predicate. But the purpose of the bill was to enjoin the Commission from instituting suits; to enjoin it not from the enforcement of its own orders challenged as unreasonable, but to enjoin it from appealing to the courts.

It will no doubt be accepted as settled law that within the limit of a reasonable compensation to a carrier for a service required to be performed by it for the public, the authorities of a State government relatively to intra-state traffic may prescribe the sum which may be exacted by a carrier for the performance of such a service.

The rate prescribed in this case has not been challenged by the averments of the bill as being *per se* unreasonable. It may be safely stated not only that the Railroad Commission had the power to fix the rates for the Express Company, but that such rates as have been fixed are reasonable. It unreasonable they become such only because the War Revenue Act of Congress has imposed a special tax upon the transportation business conducted by the carrier. Does the fact that Congress has seen proper to impose upon the carrier this burden justify the carrier in demanding of the shipper a sum in addition to the rate legally prescribed by the State Commission? If so, then Congress can by imposing taxes regulate intra-state

traffic. Congress has no more power directly or indirectly to regulate intra-state traffic, than the authorities of a State have to regulate commerce between the States.

It is admitted that according to all theorists the burdens of an excise tax must fall ultimately upon the consumer, unless there is some intervening legal obstacle, which prevents the person first paying the tax from passing it along with the price of the commodity upon which the tax is levied to the person ultimately consuming it. It has been within the police power of towns, cities and States time out of mind to regulate the sale of liquor, breadstuffs, etc. When the Federal Congress or the State Legislature imposes a tax upon the manufacture of liquor, or the business of manufacturing liquor, this tax must first be paid by the distiller, he then charges it into the price of the liquor to the wholesaler and so on until it is ultimately paid by the consumer. But let us suppose that in order to prevent frauds the State in the exercise of its police power has prescribed the retail price of liquor and the size of the glass, the tax in such a case must necessarily fall short of the consumer, and while the State does not thus prescribe who shall pay the tax, it does indirectly prescribe who shall not pay it. The Act of Congress does not in terms prohibit the carrier from passing along its burden to the shoulder of the public, but the State has legally "fixed the price of the liquor and the size of the glass" and thus rendered the shifting of the burden impossible.

Prior to the passage of the Act, authorizing the making of rates if a railroad or express company sustained a loss from any cause, whether from robbery, dishonesty or negligence of its servants, or increased taxes, whether levied by the State or Federal government, there was no legal obstacle to its passing along that burden in an increased freight rate, but since its rates are made for it—since the law prescribes the rates—it must bear its own burdens.

The special tax was made the burden of the company pri-

marily. Upon the inter-state commerce it is free to pass along that burden to the public for Congress did not see proper to prohibit its doing so, but relatively to commerce within the State, the State, having competent authority to make rates, has done so and the carrier must bear its own burden. The case from Michigan recently decided by the Supreme Court does not conflict with our position in this case. It decides only that, admitting even that under the general law the burden of the stamp tax falls primarily upon the carrier, there is nothing in the Act of Congress which prohibits the carrier from passing it along to the shipper. This is true, but suppose that Congress had conferred upon the Inter-State Commerce Commission the power to fix rates upon inter-state traffic, would the carrier then as against a maximum rate established by that commission be able to pass along its burden. The power of the State with respect to intra-state rates stands upon as high a plane as that occupied by the Federal government with respect to inter-state traffic. Let us admit however that Congress may tax state commerce then, so far as may concern intra-state rates of express companies within the State of Georgia, those rates occupy to the Revenue Act practically the same position as do charges for postoffice money orders. Both charges are fixed by law. To authorize either to be increased there must be direct legislation. There is such legislation in the Act as to the postal charges, but none as to express rates. This principle is recognized in the State Freight Tax case. 15 Wall, 232–273, which is cited approvingly in the late decision in the Michigan case.

II

If the order of the Commission requiring the payment of this revenue tax by the express company be tantamount to the fixation of an unreasonably low rate by the Commission, then the express company may refuse and fail to obey the

same, and should the Commission seek to enforce its order by directing a suit to be brought in the name of the State to recover the penalty imposed by law for the failure of the company to comply with the orders of the Commission no recovery could be had, for an express company is only liable for a penalty when it violates a just and reasonable rule or regulation of the Railroad Commission. As to whether or not the order or rule in question is reasonable or unreasonable can and should be determined only upon a suit brought in the name of the State against the express company in the county where such rule or order was disobeyed. The question there involved is very fully discussed and decided in line with this contention by Judge Newman in the case of the Richmond & Danville Railroad Company *v.* Trammell, *et al.*, 53 Fed. Rep. 196. This case was considered by Judge Newman in connection with Judge Pardee, and both concurred in the decision. If the action of the Commission was final and conclusive then the Constitution of the United States might be contravened, but railroad and Express companies under that decision may defend the penalty suits by showing the orders of the Commission to be unjust and unreasonable.

The court not having jurisdiction of such penalty suits,, has not the jurisdiction of a bill to enjoin same.

A suit to recover the penalty prescribed by law for a violation of the rules and regulations of the Railroad Commisson is not a civil suit. "An action is civil when it lies to enforce a private right or redress a private wrong. It is criminal when instituted on behalf of a sovereign or commonweath in order to vindicate the law by punishment of a public offense." Repalje and Lawrence Law., Dict., page 21.

Burrell defines penalty as "a punishment imposed by statute as a consequence of the commission of a certain specific offense; a pecuniary punishment or sum of money imposed by statute to be paid as a punishment for the commissiom of a certain act." Burrell Law Dic., page 286. He defines a

penal action "to be an action upon a penal statute; an action for the recovery of the penalty given by statute."

Penalty suits are held not to be removable from State courts to Federal courts, for the reason that the same are actions of a criminal nature, and therefore not included within the Act of Congress providing for the removal of cases from State to Federal courts. 37 Fed. Rep. 497; 38 Fed. Rep. 161; 41 Fed. Rep. 228; 45 Fed. Rep. 82.

In the case of the Railroad Commission of Iowa v. Chicago Railway Company, 45 Fed. Rep. 82, it was held that a suit by the Commission to compel a railway company to obey the regulations of the Commissioners could not be removed to the Federal Courts, even though the parties were citizens of different States, such a suit being in effect an attempt by the State to execute its laws.

The State of Wisconsin in the courts of that State obtained a judgment against the Pelican Insurance Company, a corporation of the State of Louisiana, for a pecuniary penalty for a violation of the insurance laws of Wisconsin. Suit was then brought upon that judgment in the Supreme Court of the United States against the Pelican Insurance Company, and it was held, 127 U. S. 265, that as such a suit was for the purpose of collecting a pecuniary penalty, and in its nature criminal, the Supreme Court of the United States did not have jurisdiction of same.

The laws of Georgia confer jurisdiction of penalty suits alone upon the superior court in the counties where the violations of the rules and regulations of the Commission occur, and if the rule or order violated is unjust or unreasonable the company has a perfect legal defense to such penalty suits. 104 Ga. 831.

Section 720 of the Revised Statutes provides that "the right of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, ex-

cept in cases where such injunctions may be authorized by law relating to proceedings in bankruptcy."

In the case of Hapgood v. Hewitt, 119 U. S. 226, it was held that "a court of equity could not interfere to enjoin a pending or threatened suit at law, to which there is a perfect legal defense." To the same effect see 15 Wall. 373; 1 High on Injunctions, sections 89 to 93 and cases there cited.

In the case of Haynes v. Carpenter, 91 U. S. 254, it was sought to enjoin the pendency of three suits in the State courts of Louisiana. The bill was dismissed and a judgment affirming the dismissal was granted by the Supreme Court. In the opinion, Mr. Justice Bradley says: "In the first place, the great object of the suit is to enjoin and stop litigation in the State courts and to bring all the litigated cases before the Circuit Courts. This is one of the things which the Federal Courts are expressly prohibited from doing. By the Act of March 2, 1793, it was declared that a writ of injunction shall not be granted to stay proceedings in a State court. This prohibition is repeated in section 720 of the Revised Statutes, and extends to all cases, except where otherwise provided by the bankrupt law. This objection alone is sufficient ground for sustaining the demurrer of the bill." See also case of Chetwood, 165 U. S. 460.

In discussing a similar point to the one involved here in the case of Hines and Hobbs v. Rawson, 40 Ga. 356, Chief Justice Brown states the principle which is contended to be applicable to this case in the following language: "The State courts are exempt from all interference by the Federal tribunals, and the Federal courts are exempt from all interference by the State tribunals, and each is destitute of all power to restrain either the process or proceedings in the other. Circuit Courts of the United States and State courts act separately and independently of each other, and, in their respective spheres of action, the process issued by the one is as far

beyond the reach of the other as if the line of division between them 'was traced by landmarks and monuments visible to the eye.' Appellate relations exist in a class of cases between the State courts and the Supreme Court of the United States, but there are no such relations between the State courts and the Circuit Courts."

The Circuit Court of the United States not having jurisdiction of a bill seeking to enjoin suits for the recovery of penalties instituted in the State courts, for the same reason it has no jurisdiction to enjoin the institution of suits in State courts. The Circuit Courts have jurisdiction of a bill to restrain the bringing of suits where they have jurisdiction of the threatened suits, sought to be restrained, also of a bill to restrain proceedings in State courts where the suits have been removed to the Federal courts, or are removable, and also of suits based upon unconstitutional laws, but it is submitted that these penalty suits do not come within either of these categories.

III.

This is a suit against the State of Georgia, and by the eleventh amendment to the Constitution of the United States no court can entertain jurisdiction of same. Its principle object is to enjoin penalty suits against the Southern Express Company. The penalty, if recovered, is for violation of the State law. Actions to recover same are to be prosecuted in the name of the State. The amount of any recovery had under such suits is to be paid into the State Treasury and used for the benefit of the State. This it seems would beyond all question make the State a party to such suits. A State can only act through an officer or agent. By the law the officer appointed to act in bringing suits to enforce these penalties are the Railroad Commissioners, and a suit against them is equivalent to a suit against the State. This question was dis-

cussed and decided in the case of Haygood *v.* Williams, 117 U. S. 52, the court holding that "where the State is not only the real party to the controversy, but the real party against which relief is sought, the nominal parties being its agents and officers without any personal interest in the subject matter, the suit is substantially within the prohibition of the eleventh amendment."

The Texas Railroad Commission case, 154 U. S. 362, and the late case against the same Commission, decided by Judge McCormick of the U. S. Circuit Court, are not in conflict with this position, and may be harmonized with the decision of the U. S. Supreme Court, in 117 U. S. *supra*. Under the Act creating the Railroad Commission of Texas express authority is given for such suits against the Commission. See pages 391 and 392, 154 U. S. Neither does the decision of the court in the Nebraska case, 169 U. S. 466, control under the facts stated in the bill now under consideration. The Nebraska Act was unconstitutional. The Georgia law is not having been upheld by both the Georgia Supreme Court and the U. S. Supreme Court. See 70 Ga. 694, and 128 U. S. 174.

This case is practically on all fours with the case of Fitts *v.* McGhee in 172 U. S. 516. There the Court held that the suit was against the State of Alabama, and therefore could not be brought without the State's consent.

J. M. TERRELL,
Of Counsel for the Railroad Commissioners of Georgia

Atlanta, Ga.

1840

PAYMENT

OF

WAR STAMP TAX

BY

Express and Telegraph Companies.

In Re RULE REQUIRING THE SOUTHERN EXPRESS COMPANY TO SHOW CAUSE WHY SUITS SHOULD NOT BE INSTITUTED AGAINST IT FOR RECOVERY OF PENALTIES FOR DEMANDING AS A CONDITION PRECEDENT TO RECEIVING EXPRESS PACKAGES FOR SHIPMENT THAT SHIPPERS FURNISH REVENUE STAMPS REQUIRED TO BE AFFIXED TO BILLS OF LADING, ETC.,

AND

In Re COMPLAINT AGAINST THE WESTERN UNION TELEGRAPH COMPANY FOR OVERCHARGE IN DEMANDING OF THE SENDERS OF TELEGRAPHIC DISPATCHES THAT THEY ATTACH AND CANCEL THE REQUISITE REVENUE STAMPS BEFORE RECEIVING THE SAME FOR TRANSMISSION.

OPINIONS OF

COMMISSIONER ATKINSON

AND ORDERS OF

THE RAILROAD COMMISSION OF GEORGIA.

ATLANTA, GA.
THE FRANKLIN PRINTING AND PUBLISHING CO.
Geo. W. Harrison, State Printer, Manager.
1898.

OFFICE OF
THE RAILROAD COMMISSION OF GEORGIA.
ATLANTA, GA., August 2, 1898.

IN RE RULE REQUIRING THE SOUTHERN EXPRESS COMPANY TO SHOW CAUSE WHY SUITS SHOULD NOT BE INSTITUTED AGAINST IT FOR RECOVERY OF PENALTIES FOR DEMANDING AS A CONDITION PRECEDENT TO RECEIVING EXPRESS PACKAGES FOR SHIPMENT THAT SHIPPERS FURNISH REVENUE STAMPS REQUIRED TO BE AFFIXED TO BILLS OF LADING, ETC.

OPINION OF COMMISSIONER ATKINSON.

It having been brought to the attention of this Commission that since the passage by the Federal Congress of an Act entitled: "An Act to provide ways and means to meet war expenditures, and for other purposes," that the Southern Express Company, a corporation engaged as a common carrier in the transportation of goods between points within this State, demands, as a condition precedent to *forwarding* goods tendered to it for shipment, that the consignor shall deliver to it the necessary revenue stamp to be affixed to the bill of lading required to be issued by such company, and complaint being made that the effect of the refusal to transport and deliver such goods, except upon compliance with such demands, was a violation of those provisions of the law in this State limiting the rates of freight chargeable by express companies to the rates prescribed by this Commission, an order was issued, calling upon the Southern Express Company to show cause why suits

should not be instituted against it for the recovery of the penalties prescribed by law for the exaction from shippers of a sum in addition to and in excess of rates prescribed by the Commission. In response to the rule thus issued, the express company, by its counsel, appeared and answered in effect, that this Commission had no jurisdiction to inquire and determine of and concerning the several matters and things set forth in said rule. Further, it denied that it had in any manner increased its charges for *forwarding* goods, or made any demand upon any person for any sum in excess of the rate fixed by this Commission. Further, it admitted that it had declined to receive goods for shipment unless the tax laid by the revenue act in question was tendered with the goods intended to be consigned, but denied that this Commission had any authority to inquire or act concerning any refusal by it to receive goods for transportation.

While under section 2196 of the Code of this State this Commission has full power, without notice, to institute suits for the penalty named in said section, "whenever, in their opinion, the circumstances authorize it," yet, in view of the great public interest involved, and in view of the many penalties which may have been incurred under a misapprehension of the true intent of the law, and in view of the volume of litigation which would necessarily result, if in each individual case a separate suit was instituted, the Commission caused the parties interested to be summoned before it, to the end that, before taking action in regard to the subject, it might be informed as to the respective rights of the consignor and carrier, and thus be able to determine whether in its refusal to accept for shipment and to *forward* goods tendered to it for transportation, without tender likewise of the necessary revenue stamps, the carrier was indeed

acting in violation of the law, and whether, if so, the violation was of such a character as in the first instance to justify the application of the drastic remedies afforded by suits for penalties which may have been incurred.

This matter having been referred to me for examination, I herewith submit the conclusions reached, and, as well, a statement of the considerations which have induced that conclusion:

According to my conception of the issues made, two questions are presented for consideration, upon the proper solution of which will depend the correctness of the conclusion reached. The first of these is: Does the act of the Federal Congress in question impose upon the express company the duty of furnishing the requisite revenue stamps to be affixed to the bill of lading required in the case of each consignment to be issued by the carrier? Second: If so, is the refusal to accept and forward such goods, except upon the conditions that the shipper shall bear the burden of the carrier to the extent of providing such stamp in addition to the payment of the regular rate prescribed by this Commission for the transportation of such goods, a violation of the law which prohibits carriers from exacting a rate of transportation in excess of the maximum rate so prescribed?

We will proceed to consider the questions proposed in the order in which they are above stated; and first, as to the duties imposed by the statute upon the respective parties. Duties may in the abstract be classified, as imposed and assumed. The former may be properly said to embrace and require the performance of that class of acts which are enjoined upon one by a mandate of some superior power which exercises a controlling influence over the will of him who is required to perform such acts. The mandate issued by such an authority operates

upon the subject whether he be willing or unwilling; and among this class of duties is included the performance of those acts enjoined by law, and which the subject is not at liberty to omit. Assumed duties are such as result from contract relations, respecting which each individual is primarily a free agent, and which can only arise in consequence of his having of his own volition entered into an agreement by the terms of which he has become bound to the performance of a given act. Duties, whether imposed or assumed, admit of another classification equally general. They may in either case be express or implied. The former includes all of those acts which have been expressly enjoined upon the subject by the mandate of a superior power; and as well, such as by the terms of his engagement he has directly pledged himself to perform. Without reference to the sources from which such duties may arise, they are equally binding upon the subject, though the methods of enforcing their performance may widely differ. Duties may be said to be implied where the acts to which they relate are neither expressly enjoined by the superior nor expressly assumed under the contract, but which are yet of such a character as that the performance of the act enjoined or assumed necessarily involves and includes the performance of some other incidental act respecting which both the mandate of the superior and terms of the engagement are silent. In such a case the law imposes as against the person bound to perform the particular act the duty likewise to perform such incidental acts as may be necessarily involved.

These distinctions are stated in order that we may more readily arrive at the true meaning and intent of the Federal Congress as that intent is manifested by the provisions of the law in question. Referring to the act under consideration, we find no express provision imposing directly upon the carrier the duty of furnish-

ing the revenue stamps required by the statute to be affixed to its bills of lading; and yet, upon a careful consideration of its various provisions it is difficult to resist the conclusion that such was the intention of the Congress. Section 7 of the revenue act referred to provides:

"SEC. 7. That if any person or persons shall make, sign or issue, or cause to be made, signed or issued, any instrument, document or paper of any kind or description whatsoever, without the same being duly stamped for denoting the tax hereby imposed thereon, or without having thereupon an adhesive stamp to denote said tax, such person or persons shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not more than one hundred dollars, at the discretion of the court, and such instrument, document or paper, as aforesaid, shall not be competent evidence in any court."

Section 6 of the act describes the classes of papers and documents to which the penal provisions of section 7 are made to apply, and refers for a more complete description to what is designated as Section A, this schedule enumerating in particular the documents generally described in sections 6 and 7. Under the heads of "Express and Freight" (Schedule A), we find the following provision:

"It shall be the duty of every railroad or steamboat company, carrier, express company, or corporation, or person whose occupation it is to act as such, to issue to the shipper or consignor, or his agent, or person from whom any goods are accepted for transportation, a bill of lading, manifest, or other evidence of receipt and forwarding for each shipment received for carriage and transportation, whether in bulk or in boxes, bales, packages, bundles, or not so inclosed or included; and there shall be duly attached, as in this act provided, to each of said bills of lading, manifests, or other memorandum, and to each duplicate thereof, a stamp of the value of one cent: *Provided*, That but one bill of lading shall be required on bundles

or packages of newspapers when inclosed in one general bundle at the time of shipment. Any failure to issue such bill of lading, manifest or other memorandum herein provided, shall subject such railroad or steamboat company, carrier, express company or corporation or person to a penalty of fifty dollars for each offense, and no such bill of lading, manifest or other memorandum shall be used as evidence unless it shall be duly stamped as aforesaid."

It will be seen from these provisions that section 7 prohibits under a named penalty the issue of any paper or document without "same being duly stamped for denoting the tax hereby (meaning by this act) imposed thereon." It will be further seen that the act imposes upon the carrier the express duty of issuing in every instance a bill of lading covering each consignment. Since, therefore, this duty is imposed and the omission to perform it rendered penal, it necessarily follows that the person expressly charged with the duty to issue the bill of lading is also impressed with the implied duty of providing the agencies and instrumentalities necessarily incidental to the performance of the duty expressly enjoined. Since he is bound to issue a bill of lading and cannot issue it without its being first stamped, the duty of stamping is necessarily incidental to and consequently included in the duty to issue. We will test this view from another point of observation: The paper upon which the bill of lading is to be written is indispensable to the execution of such an instrument. Suppose in the absence of the statute the parties had entered into a contract of affreightment under which, upon a given consideration, the carrier assumed to transport the goods of consignor to a given point, what court would for an instant consider the proposition that the consignor, in addition to the rates prescribed by the contract, should be

charged with the duty of preparing the bills of lading? The duty of preparing the bill of lading is one springing out of the contract, and devolves necessarily upon the carrier unless the consignor varies the general rule and expressly assumes that burden.

Since the law imposes upon the carrier the duty of furnishing to the shipper a bill of lading, nothing short of a complete bill of lading, evidencing a completed contract of affreightment, will suffice; for unless it comes up to that standard it is not a bill of lading in contemplation of the statute, and since the affixing of the stamp, according to the very terms of the act, is indispensable to the evidence of a contract of affreightment, it follows that this is one of the incidental acts which is to be performed by the carrier; and since the law enjoins upon it the duty to affix the stamp (there being no express requirement that it shall be furnished by the consignor), the necessary and irresistible implication is that it shall be furnished by the person bound to affix it.

In the course of argument in this case it was urged that inasmuch as the statute did not expressly designate the person who should bear the cost of furnishing the requisite stamps, its silence respecting that subject was to be accepted as evidence of indifference upon the part of the Congress as to the person upon whom this duty devolved; and, as further emphasizing this idea it was pointed out that there were two penalties imposed by the Act; one against the carrier, pecuniary in its nature; the other against the consignor, which rendered an unstamped bill of lading inadmissible as evidence. I do not find in this circumstance any evidence of a legislative intent either to excuse the carrier from the duty of affixing and furnishing the requisite stamp or of an intent to leave the matter in such a state as to enable the carrier to impose this duty upon the shipper. On the

contrary, it would seem that the infliction of the penalty upon the consignor was rather designed as an additional safeguard against loss of revenue to the Government by making it to the interest of the shipper to see to it that the carrier in the first instance furnished to him such an evidence of the contract of affreightment as would be available to him in case his rights under such contract should ever be called in question. And since this could only be accomplished by stamping the instrument as required by law, the consignor was given a direct concern in seeing to it that the carrier had performed its duty of affixing and cancelling the stamp before accepting the bill of lading. If it had been the intention of the Federal Congress to require of the carrier no more than the delivery to the consignor of the unstamped bill of lading, then the penalty for failure to stamp and cancel the same would most naturally have been directed against the person who had in accepting the bill of lading subsequently failed to stamp it. If the penal act consisted in the failure to stamp a bill of lading subsequent to its issue, there might be some reason in holding that the consignor accepting such a bill of lading would be the person whose duty it was to stamp it; but since the penal act consists in the issue of an unstamped bill of lading, it necessarily follows that the one issuing the bill of lading must stamp it in order to avoid the penalty. If it had been the purpose of the Federal Congress to impose this burden upon the shipper, the most natural course would have been to require that an article presented for shipment should itself bear a cancelled stamp. Had this been done the duty would have been upon the shipper; because until a stamp was affixed the carrier would have been under no duty to receive the goods for shipment. But since on the other hand the Congress has seen proper to require a stamp to be affixed to the bill of lading,

which must itself originate with the carrier and be issued by him, the conclusion is inevitable that it was the purpose of the law to charge the carrier with the cost.

Aside from these considerations, when we take the broader view and consider the circumstances under which and purposes for which this bill was passed; when we consider that the country was just engaging in a conflict with a great and powerful nation; that in consequence it was necessary to raise by taxation enormous sums of money to maintain the national military and naval forces and equipment and that, in order to raise this money, it was necessary to bring under the taxing power all the resources of all the people; that every industry and every person, even in the most trivial domestic and business concerns are required by the system of stamp taxation devised to contribute to this common fund; that it is so far-reaching in its effects that none could escape the exactions of the tax-gatherer, it is not conceivable that the Federal Congress should have selected great transportation companies of the country as the sole object of special legislative benefaction and, taxing all others, exempt them alone from the operation of the law. If it be ultimately held that the carrier is not liable for this tax he is excused from all contribution to the general fund; for while other corporations are taxed upon special transactions and upon gross and net receipts, these corporations are exempted from that class of taxes and throughout the whole scheme of this elaborate piece of legislation there is no provision which by any possibility can be so extended as to impose upon the carrying companies of the country any portion of the common burden. It is submitted that to attribute to the Congress such a purpose would be to deny to it credit for either patriotism or a proper sense of justice. The better conclusion is that when the Congress required carriers to issue a bill of

lading to every shipper its purpose was to require the issue of such evidence of contract of affreightment as would enable the shipper to enforce the duty of carriers; and since affixing the stamp was necessary to the completion of such a bill of lading, the duty was by necessary implication imposed upon the carrier of furnishing and cancelling it.

We come now to consider whether or not the exaction of the cost of a revenue stamp from the shipper amounts to an "extortion," within the meaning of that term as employed in section 2187 of the Code. That Section provides as follows:

"If any railroad corporation organized or doing business in this State under any act of incorporation or general law of this State now in force, or which may hereafter be enacted, or any railroad corporation organized or which may hereafter be organized under the laws of any other State, and doing business in this State, shall charge, collect, demand or receive more than a fair and reasonable rate of toll or compensation for the transportation of passengers or freight of any description, or for the use and transportation of any railroad car upon its track, or any of its branches thereof, or upon any railroad within this State which it has the right, license or permission to use, operate or control, the same shall be guilty of extortion, and, upon conviction thereof, shall be dealt with as hereinafter provided."

By the terms of the act creating this commission, power was conferred upon the Railroad Commission of Georgia relatively to intra-state business, in general and comprehensive terms, "to make reasonable and just rates." Section 2189 of the Code makes it the duty of and empowers the commission "to make reasonable and just rates of freight and passenger tariffs, to be observed by all railroad companies doing business in this State on the railroads thereof; shall make reasonable and just rules and regulations to be observed by all railroad companies doing business in this State as to the charges at any and all points for the necessary handling and delivery of freights; shall make such just and reasonable rules and regulations as may be necessary for preventing

unjust discriminations in the transportion of freight and passengers on the railroads in this State," and other powers and duties not necessary here to enumerate. It was required to make and publish a "schedule of just and reasonable rates of charges for the transportation of passengers and freights and cars on each of said railroads. (See Code, section 3190.) By section 2187 it was made unlawful for a railroad company to charge other than such rates; and by section 2196 appropriate penalties are provided for violations of these sections. By an act subsequently passed (which is incorporated in section 2217 of the Code of this State), express companies, to the same extent as railroads, were placed under the control of the Commission; and it was provided in the last-named act that this Commission "shall have full power to regulate the prices to be charged by any company or persons owning, controlling or operating any such line or lines for any service performed by any such company or person," and the penalties prescribed against railroads for violations of the rules and regulations of the Commission were made applicable to express companies. In the exercise of these powers the Commission has prescribed maximum rates for express service, and has fixed the "prices" to be charged by express companies for the services required to be performed by them in and about the handling of express matter. As necessarily incidental to the duty of transportation which the law of this State imposes upon all carriers, there is the duty to receive and deliver goods tendered for shipment, in accordance with the directions of the consignor. Relatively to the process of conducting their business as such, carriers may make such rules and regulations as may be necessary to their protection; but they cannot under the guise of regulation by any method, directly or indirectly, increase to the shipper beyond the rates fixed by the

Commission the "price" of any service which it undertakes to perform, or impose upon him duties and burdens which are by law imposed upon it.

Under an ordinary contract of affreightment, entered into independently of any law fixing the rates to be charged, the carrier is not authorized to add to the price of agreed compensation any expense incidentally incurred by it in the execution of the contract of affreightment. This principle is well stated in a decision of the Supreme Court of the United States, in the case of Covington Stock Yards Co. *v.* Keith. (Vol. 139 Decisions of Supreme Court, U. S., p. 135.) It there lays down the rule to be: "A carrier of live stock has no more right to make a special charge for merely receiving or merely delivering such stock in and through stock yards provided by itself, in order that it may properly receive and load, or unload and deliver such stock than a carrier of passengers may make a special charge for the use of its passenger depot by passengers when proceeding to or coming from its trains, or than a carrier may charge the shipper for the use of its general freight depot in merely delivering his goods for shipment, or the consignee of such goods for its use in merely receiving them there within a reasonable time after they are unloaded from the cars."

Such being the rule, relatively to contracts in which the price of the service is fixed by agreement between the parties, the same principle would apply with equal force where the rate is prescribed by positive law. To say that a carrier could increase the prescribed rate by the exaction of a sum in addition thereto to cover an incidental expense incurred by it in the execution of its duty to transport would be to admit that, by indirection, it could lawfully accomplish the same end which by the terms of the statute it is prohibited from doing directly.

If, therefore, an express company, under the guise of a charge for receiving goods for shipment, could exact the payment in advance of the revenue tax which devolves upon it, it could as well demand for the same reason any other sum. If they may exact one cent for receiving goods, they may as well exact one hundred cents, and thus directly increase the cost of the service required by law to be performed by it far beyond that prescribed by the rates fixed by this Commission. The service required by law to be performed by the carrier, as we have seen, includes the receipt, transmission and delivery of goods offered for shipment. By the express terms of the statute this Commission is authorized to fix in advance the "price" of that service. It cannot demand from the shipper any sum for that service beyond the rate prescribed; and an effort to subdivide the service so as to enable it to make a charge beyond the prescribed rate is necessarily merely colorable, and is such a scheme or device to evade the law as ought not to be accepted as an excuse for its refusal to conform to the regulations of this Commission fixing rates. While it is true that under its right to make reasonable rules and regulations, compliance with which may be required as a condition precedent to the reception of goods for shipment, it has no right by these means to impose upon the shipper the burdens which otherwise under the law would rest upon it.

I am thus led to the conclusion that in refusing to accept for shipment goods tendered to it without the prepayment by the shipper of the revenue tax required by it to be affixed to its bill of lading, it violates the provisions of the Act hereinbefore referred to, and incurs the penalties which are therein prescribed.

Respectfully submitted,

SPENCER R. ATKINSON,
Commissioner.

OFFICE OF
THE RAILROAD COMMISSION OF GEORGIA.
ATLANTA, GA., August 2, 1898.

IN RE COMPLAINT AGAINST THE SOUTHERN EXPRESS COMPANY FOR OVERCHARGE IN DEMANDING THAT SHIPPERS FURNISH REVENUE STAMPS TO AFFIX TO BILLS OF LADING OR RECEIPTS.

On motion of Commissioner Crenshaw it is ordered: That the report and opinion this day filed by Commissioner Atkinson, to whom the above entitled matter was referred, be, and the same is, hereby adopted as the opinion and judgment of this Commission:

And it is further ordered: That unless within five days from this date this Commission is advised by the Southern Express Company that it has discontinued the practice of exacting from shippers the duty of furnishing the requisite revenue stamps to be attached to bills of lading or receipts as a condition precedent to receiving and forwarding goods tendered for shipment, that this Commission will take such legal steps as may be necessary to enforce compliance with its rules and regulations.

By order of the Board:

J. D. MASSEY, Secretary.

L. N. TRAMMELL, Chairman.

1841

No. 390.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

Office Supreme Court U. S.
FEB 25 1901
JAMES H. McKENNEY,
Clerk.

Filed Feb. 25, 1901.

WILLIAM B. DINSMORE and C. GRAY DINSMORE, and WILLIAM B. DINSMORE, C. GRAY DINSMORE and DUMOMD CLARK, as Executors and Trustees under the Will of WILLIAM B. DINSMORE, Deceased, Appellants,

vs.

THE SOUTHERN EXPRESS COMPANY; L. N. TRAMMELL, THOMAS C. CRENSHAW, Jr., and SPENCER R. ATKINSON, Composing the Railroad Commission of the State of Georgia, *et al.*, Appellees.

Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, and Return.

SUPPLEMENTAL BRIEF FOR THE RAILROAD COMMISSION OF GEORGIA.

J. M. TERRELL, OF COUNSEL FOR THE RAILROAD COMMISSION OF GEORGIA.

ATLANTA, GA.
The Franklin Printing and Pub. Co.
1901

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

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vs.

THE SOUTHERN EXPRESS COMPANY, L. N. TRAMMELL, THOMAS C. CRENSHAW, JR., and SPENCER R. ATKINSON, composing the Railroad Commission of the State of Georgia, *et al.*, Appellees.

Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, and Return.

SUPPLEMENTAL BRIEF OF J. M. TERRELL, OF COUNSEL FOR THE RAILROAD COMMISSION OF GEORGIA.

I.

The Railroad Commission does not seek by its order to deny to the Southern Express Company the right to contract, which it enjoys under the law. No express company has the right to contract for the carriage of goods at a higher rate than the maximum rate fixed by the Commis-

sion, when that rate does not contravene the requirements of the Constitution. The allegations in the bill show that a considerable number of shipments are made by the Company for a price below the maximum prescribed rate, as to all such shipments the Company may contract with the shippers as to the payment of revenue stamp without violating the law or the order of the Commission. This view is in perfect harmony with the case cited by Mr. Miller in 110 Ga. 687.

II.

It was proper practice for the Circuit Court of Appeals to order the bill dismissed. The bill appeared to the court to be devoid of equity, therefore the court was authorized to grant an order directing the bill to be dismissed. See 177 U. S. 485-495. The Court of Appeals for the Fourth Circuit in 87 Fed. Rep. 457, remanded the cause to the court below with instructions to dismiss the bill. The case was then brought to this Court, where it was contended that the appellate court should have permitted further proofs, and this Court in 178 U. S., 168-183, affirmed the judgment of the Court of Appeals and cited approvingly the case in 177 U. S. 495.

Respectfully submitted,

J. M. TERRELL,

Attorney for the Railroad Commission of Georgia.

Atlanta, Ga.

Supreme Court of the United States.

No. 136.—October Term, 1901.

William B. Dinsmore and C. Gray Dinsmore, and William B. Dinsmore, C. Gray Dinsmore and Dumont Clarke, as Executors and Trustees under the will of William B. Dinsmore, deceased, Petitioners,
vs.
The Southern Express Company, L. N. Trammell, Thomas C. Crenshaw, Jr., and Spencer R. Atkinson, composing the Railroad Commission of the State of Georgia, et al.

On writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[November 18th 1901.]

Mr. Justice Harlan delivered the opinion of the Court.

William B. Dinsmore and others, citizens of New York—some of them being executors and trustees under the will of the late William B. Dinsmore of that State—brought this action on the 17th day of April 1897 in the Circuit Court of the United States for the Southern District of Georgia against the Southern Express Company, a corporation of Georgia, having its principal place of business in that State, and also against L. N. Trammell, Thomas C. Crenshaw and Spencer R. Atkinson, constituting the Railroad Commission of Georgia, and Joseph M. Terrell, Attorney General of Georgia, the individual defendants being citizens of Georgia.

The plaintiffs sued as owners and holders of shares of stock in the defendant express company, and sought a decree that would prevent the application by that corporation of any of its moneys to meet the requirement of the War Revenue Act of June 13th 1898, c. 448, in relation to adhesive stamps to be placed upon bills of lading, manifests or other evidences of the receipt of goods for carriage or transportation.

The portion of that act to which the bill referred is the following:

"Express and Freight: It shall be the duty of every railroad or steamboat company, carrier, *express company*, or corporation or person whose occupation is to act as such, to issue to the shipper or consignor, or his agent, or person from whom any goods are accepted for transportation, a bill of lading, manifest or other evidence of receipt and forwarding for each shipment received for carriage and transportation, whether in bulk or in boxes, bales, packages, bundles, or not so enclosed or included; and there shall be duly attached and cancelled, as is in this act provided, to each of said bills of lading, manifests or other memoran-

dum, and to each duplicate thereof, a stamp of the value of one cent: *Provided*, That but one bill of lading shall be required on bundles or packages of newspapers when inclosed in one general bundle at the time of shipment. Any failure to issue such a bill of lading, manifest or other memorandum, as herein provided, shall subject such railroad or steamboat company, carrier, express company, or corporation or person to a penalty of fifty dollars for each offense, and no such bill of lading, manifest or other memorandum shall be used in evidence unless it shall be duly stamped as aforesaid." 30 *Stat.* 448, 459.

After the passage of the above act complaint was made by citizens of Georgia to the Railroad Commission of that State to the effect that the defendant express company required shippers or consignors to supply the requisite stamps for bills of lading or receipts given to them. The Commission thereupon, July 11th 1898, ordered that the Southern Express Company appear before it on the 18th day of July 1898, "then and there to show cause, if any it can, why it should not be held to have violated the rules and regulations of this Commission by the exactions or overcharges, as aforesaid, and why suit should not be instituted against it in every case of such overcharges for the recovery of the penalty provided by law for such illegal act."

The company appeared and denied the jurisdiction of the Commission. But on August 2d 1898 the Commission, after hearing the parties, ordered that the required stamp be supplied by the express company, and not by shippers in whole or in part.

Appropriate allegations having been made to show that the suit was not a collusive one to confer on a court of the United States jurisdiction of the case, of which it would not otherwise have cognizance, the relief asked was—

That it be adjudged and decreed that the order of the Railroad Commission of the State of Georgia of August 2d 1898, requiring the express company to pay the amount of the war revenue tax on business from one point to another in the State without endeavoring to collect the same from shippers, or requiring them to make the payment thereof before the issuing of receipts or bills of lading, was unconstitutional, null and void; that the express company, its officers and agents be restrained from voluntarily complying with the order of the Commission of August 2d 1898 and paying such tax; that the Attorney General of the State be restrained from instituting any suit against the express company for the purpose of enforcing the provisions of the above order of the Railroad Commission; that a perpetual injunction, of the same purport, tenor and effect be granted to complainants; and that the plaintiffs have such other and further relief in the premises as the nature of the case required and to a court of equity might seem meet.

The Railroad Commissioners and the Attorney General of the State severally demurred to the bill. The case having been argued upon the demurrers, Judge Speer, delivered an opinion which is reported in 92 *Fed. Rep.* 714.

That opinion was accompanied by the following order, entered March 7th 1899: "It is now upon consideration ordered, adjudged and decreed that the prayer that the Southern Express Company be enjoined from voluntarily paying the war-stamp tax in question be, and the same is hereby, denied; ordered, adjudged and decreed further that the defendants, the Railroad Commission of Georgia, and each member thereof, to wit, the individual defendants, Leander N. Trammell, Thomas C. Crenshaw, Jr., and Spencer R. Atkinson, be, and the same are hereby, enjoined from any and all order, direction, action or legal steps instituting or tending to institute, and from any and all proceedings for the recovery of the penalties named in the statute of Georgia in that behalf to enforce compliance with its said order against the Southern Express Company, its officers or agents, as threatened in the order of said commission, dated August 2, 1898, for the reason that said order is null and void, and said commission has no jurisdiction to adjudge and designate the party who shall pay said tax." The court in its opinion said: "It is not deemed necessary to enjoin the Attorney General, for it is presumed that this lawyer, who is the official head of the bar of the State, will, without such injunction, accord all appropriate respect to the decision of the court."

Upon appeal to the Circuit Court of Appeals the decree of the Circuit Court was reversed, June 7th 1900, with directions to dismiss the case, Judge McCormick delivering the opinion of the court, Judge Shelby dissenting. 102 *Fed. Rep.* 794.

The case was thereupon brought to this court upon writ of certiorari, and was submitted for decision at the last term.

After the submission of the case in this court the above part of the War Revenue Act of 1898 relating to stamps to be attached to bills of lading, manifests, &c., was amended in important particulars by an act of Congress approved March 2d 1901, c. 806. One amendment, which took effect on and after July 1st 1901, provided that the above part of the act of 1898 should be amended to read as follows:

"FREIGHT: It shall be the duty of every railroad or steamboat company, carrier or corporation, or person whose occupation is to act as such, *except persons, companies or corporations engaged in carrying on a local or other express business*, to issue to the shipper or consignor, or his agent, or person from whom any goods are accepted for transportation, a bill of lading, manifest or other evidence of receipt and forwarding for each shipment received for carriage and transportation, whether in bulk or in

boxes, bales, packages, bundles, or not so inclosed or included; and there shall be duly attached and cancelled, as is in this act provided, to each of said bills of lading, manifest or other memorandum, and to each duplicate thereof, a stamp of the value of one cent: *Provided*, That but one bill of lading shall be required on bundles or packages of newspapers when inclosed in one general bundle at the time of shipment. Any failure to issue such a bill of lading, manifest or other memorandum, as herein provided, shall subject such railroad or steamboat company, carrier or corporation, or person to a penalty of fifty dollars for each offense, and no such bill of lading, manifest or other memorandum shall be used in evidence unless it shall be duly stamped as aforesaid." 31 *Stat.* 938, 945.

This change in the law renders it unnecessary to consider any of the important questions determined in the Circuit Court and Circuit Court of Appeals under the act of 1898. The object of this suit was to prevent the enforcement of the order of the Railroad Commission based upon its construction of that act. But whatever might be now held as to the meaning and scope of the act of 1898 as applied to express companies, the amendatory statute of 1901, in declaring what companies, corporations and persons shall attach the required stamp to bills of lading, manifests and receipts for goods or other property to be transported, distinctly excludes express companies. So that no actual controversy now remains or can arise between the parties. The plaintiffs do not need any relief, because the act of 1901 accomplishes the result they wished.

Although this cause was determined in the Circuit Court of Appeals and was submitted here prior to July 1st 1901, our judgment must have some reference to the act of 1901. In *United States* v. *Schooner Peggy*, 1 *Cranch*, 103, 109, the Chief Justice, delivering the opinion of the court, said: "It is in general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, and of that no doubt in the present case has been expressed, I know of no court which can contest its obligation." *Mills* v. *Green*, 159 *U. S.* 651, 653; *New Orleans Flour Inspectors* v. *Glover*, 160 *U. S.* 170; *Ib.*, 161 *U. S.* 101.

If the cause had not been submitted in the Circuit Court of Appeals until after the act of 1901 took effect, that court, we apprehend, would have dismissed the suit upon the ground that by the operation of that legislation the whole subject-matter of litigation had disappeared and that the order of the Railroad Commission, even if originally valid, ceased to have any effect. The question whether the express company or the shipper was required by the act of 1898 to furnish the required stamp, as

well as the question whether the Railroad Commission had any power to make the order of which complaint is made, would thus have become immaterial, and the dismissal of the suit would have resulted without any reference to the merits of the case as affected by the act of 1898.

As the order of the Circuit Court of Appeals directing the dismissal of the suit accomplishes a result that is appropriate in view of the act of 1901, we need not consider the grounds upon which that court proceeded, or any of the questions determined by it or by the Circuit Court, and the judgment must be affirmed without costs in this court.

It is so ordered.

True copy.

Test:

Clerk Supreme Court, U. S.